[Emblem of the State of Israel]

The Courts

The Magistrates Court in Jerusalem **CC 21135/95**

Before the Honorable Justice Dr. Mikhal Agmon-Gonen **Date: 8 July 2001**

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In the matter of: _____ **Al-Shuweiki**

The Plaintiff

v.

The State of Israel

The Defendant

Judgment

The Complaint:

The Plaintiff, a table tennis team member, wanted to travel from Hebron to Jordan to take part in training sessions with the Jordanian team, as well as in a table tennis tournament in Jordan and thereafter in France. The club for which the Plaintiff plays applied to the Civil Administration to allow the Plaintiff and other athletes to travel to the said tournament. The club's application with regard to the Plaintiff was denied. The club turned to HaMoked: Center for the Defence of the Individual, founded by the late Dr. Lotte Salzberger (hereinafter: HaMoked: Center for the Defence of the Individual), to help the athletes travel to the said tournament. HaMoked: Center turned to the region authorities, and on 26 April 1994 the office of the Legal Adviser to the Judea and Samaria Region notified HaMoked: Center for the Defence of the Individual that there was no impediment to the departure of seven athletes, including the Plaintiff, from the region.

HaMoked: Center for the Defence of the Individual notified the Plaintiff thereof, and on 5 May 1994 the Plaintiff, along with the delegation of athletes, arrived at the Allenby Bridge, where he was notified that he could not leave the region, and returned to his home in Hebron.

There is no dispute that the Plaintiff was active in the Hamas movement, admitted thereto and even served a prison sentence therefor. Nor is there any dispute that, on 3 May 1994, after the Plaintiff's exit permit was issued, intelligence was received on the Plaintiff, due to which there was no room to allow the Plaintiff to leave the region. The Plaintiff's claim is that since

he was issued a permit on 26 April 1994, the region authorities should have notified him that the decision in his case had been changed, and that he could not exit, so as to save him both the expenses of traveling from Hebron to the Allenby Bridge and back, and, primarily, the distress caused to him from having expected to leave for Jordan with the rest of the delegation, and, instead of joining his friends, to return from the bridge to his Hebron home.

This trial does not concern the question of when the application of a region resident to leave the region may be refused. This issue has been the subject of many judgments, but it is not the dispute before us. The Plaintiff is prepared to accept that the Region Commander has met the tests determined in the case law for denying an application to leave the region; the question is whether the authorities were not obligated, after having notified the Plaintiff that his exit was approved, to notify him also that the permit had been revoked.

Notice of the permit revocation:

The Plaintiff's claim is directed against the fact that after he had already received the permit, from which moment forth, if not earlier, he had a legitimate expectation to be able to leave for the competitions, he was not informed, prior to arriving at the Allenby Bridge, of the change in the decision, even though there was sufficient time to do so.

The Plaintiff's counsel claimed that the decision to allow the Plaintiff to leave the country was made by mistake, and that the authorities subsequently "discovered" the Plaintiff's past and therefore prevented his departure. At the outset I shall already state that this question is irrelevant. Whether it was a mistake that was timely discovered, or whether the decision to approve his departure was made and modified owing to subsequent information, the question is whether the authorities were not required to notify the Plaintiff that the decision had been changed.

The Defendant's main argument on this matter is that if notice had been given to the Plaintiff of the change in the decision, the source which produced the intelligence, due to which the decision to allow the Plaintiff to leave the region was changed, would have been jeopardized. Before discussing the legal issue, I shall decide the factual issue. From the factual point of view, the Defendant has not proven this claim.

The 3 May 1994 intelligence, on the basis of which the decision in the Plaintiff's case was changed, has been presented to me. For reasons of national security it was not presented to the Plaintiff and his counsel, nor was a discussion on its content held. However, after perusing the intelligence, it can be clearly stated that nothing therein indicated that had the Plaintiff been

notified of the change in the decision, such notification would have jeopardized a source of information. Without compromising national security, it may be said that the intelligence deals with an unspecified period of time and with a long list of people, so the date of receipt thereof is insignificant and cannot in any way, in itself, point to such or another source.

The Defendant's counsel has claimed that this matter, namely whether a notice would or would not have compromised the source, lies within the realm of professional expertise of the GSS [General Security Service] person, referred to as Yosi, who testified before me. Now then, in criminal proceedings, this court is required to determine, as a matter of routine, whether the discovery of a certain document or a certain fact could compromise a source or a person. It is not a question of expertise, on which GSS personnel have an advantage. The intelligence was clear and detailed. As mentioned above, there was nothing in it that tied it specifically to a certain source or a certain time. In addition, the Plaintiff could have been notified that his exit was approved by mistake (not because this was the case, but rather to avoid "compromising" the said source). If, as the Defendant's counsel claimed in his summations, it was quite clear to the Plaintiff that he would not be approved due to his past (the Defendant's counsel claimed this with regard to the damage), then had he been notified that the permit was issued by mistake, and that in view of his past his exit was being denied, he would in any case not have suspected a thing.

The State's liability for the tort of negligence

Having determined that there was no impediment – on grounds of either security or practicality – to notifying the Plaintiff of the revocation of his exit permit prior to his arrival at the Allenby Bridge, we come to the question of whether the authorities had a duty to do so. The cause of action is tortious. The Plaintiff claims that the authorities had a duty to notify him, that they had breached this duty and that he suffered the damages claimed in the complaint as a result thereof.

The question that arises is the duty of the Civil Administration to give notice, in cases such as this one, of the change in its decision. The State's counsel claimed that the State is imposed with no such duty, and that the Plaintiff has to point to a legal source of such a duty. Well, the source is Article 36 of Pequddat ha-Neziqin (Nosah Hadash) [the Torts Ordinance (New Version)], which imposes liability for negligence. Hoq ha-Neziqin ha-Ezrahiyyim (Ahrayut ha-Medina) [Torts Law (State Liability)], 5712-1952 (in Article 3 thereof), does not exempt the State from liability for negligence. Consequently, if a duty exists, the Defendant may be held liable.

On this matter, it was ruled in CA 429/82 *The State of Israel v. Suhan*, *Piskei Din* 42 (3) 733, in which case the police failed (against a court order) to stay the Plaintiff's husband's exit from the country, as follows (the Honorable Justice A. Barak, on p. 736):

> **In a long series of consistent judgments, this court has ruled that a government authority exercising a statutory power is not immune from liability for negligence due to the negligent exercise of such authority.**

Justice Barak further ruled that the duty should be examined under the circumstances of the specific case, and that once the court ruled that such a duty should exist, it must further consider whether, due to reasons rooted in public policy, the duty should be denied (for an analysis of the duty of public authorities to act reasonably, see: A. Rubinstein and D. Friedmann, "Ahrayut ovede zibbur binziqin" [The Liability of Civil Servants in Tort], *Hapraklit* 21 (1964):61).

Human Dignity and the Duty of Giving Notice

The duty of notifying the Plaintiff of the revocation of the permit is, in my opinion, imposed on the authorities by Hoq Yesod: Kevod ha-Adam we-Heruto [Basic Law: Human Dignity and Liberty].

The Basic Law: Human Dignity and Liberty has raised the rights fixed therein to a constitutional, supra-statutory, status. Case law and most scholars agree that the basic laws should shift the point of balance between man's right to liberty and dignity, and public safety and other interests.

On this matter, Deputy President A. Barak ruled, in CrimR 537/95 *Ghanimat v. The State of Israel*, *Piskei Din* 49 (3) 355, 410, as follows:

> **The enactment of the basic law was a significant Israeli milestone. The normative status of several human rights was changed. They had become part of the State's constitution. They were given a constitutional, supra-statutory, status… elementary rules of interpretation with respect to the need to maintain statutory harmony, call for the conclusion that the basic law exerts a normative effect on old legislation. Indeed, "language in a statute lives in its environment" (Justice Sussman in HCJ 56/68 *Shallit v. The Minister of the Interior*,**

***Piskei Din* 23 (2) 429, 513. This "environment" includes not only the immediate statutory context, "but also wider circles of accepted principles, basic goals and fundamental criteria" (HCJ 165/82 *Qibbuz Hazor v. Rehovot Assessing Officer*, *Piskei Din* 39 (2) 70, 75; see also HCJ 680/88 *Schnitzer v. The Chief Military Censor*, *Piskei Din* 42 (4) 617, 626. Every statute is integrated into its normative environment, and is affected thereby (HCJ 693/91 *Efrat v. The Population Registration Commissioner*, *Piskei Din* 47 (1) 749. He who construes one statute is construing legislation on the whole. Every single statute maintains a relationship of equilibrium with the legislative system. And if this is the case in the relationship between "ordinary" laws amongst themselves, *a fortiori* so when it comes to the relationship between old "ordinary" legislation and the new basic laws. These basic laws have changed the normative status of human rights. They have determined that "basic human rights in Israel are founded upon the recognition of human value, the sanctity of life and human liberty, and shall be honored in the spirit of the principles in the proclamation on the establishment of the State of Israel" (Article 1 of the Basic Law: Human Dignity and Freedom, and Article 1 of Hoq yesod: Hofesh ha-issuq [Basic Law: Freedom of Occupation]). These basic laws are therefore not only an expression of the basic values of our legal system, but also "the foundation of the Israeli jurisprudence" (Deputy President Elon in CA 506/88 *Shefer v. The State of Israel*, *Piskei Din* 48 (1) 81, 105. Consequently, the Basic Law: Human Dignity and Freedom exerts an interpretational effect on old law. True, a basic law cannot change the validity of old law. But the basic law should affect the meaning of old law. An expression of this (interpretational) trend appears in the Basic Law: Freedom of Occupation, which determines that old law "shall be construed in the spirit of the provisions of this Basic Law"**

> **(Article 10). Such is the case with regard to the (interpretational) effect of the Basic Law: Human Dignity and Liberty on the construction of old law. Old law should be construed in the spirit of the provisions of the Basic Law: Human Dignity and Freedom. Indeed, Article 10 of the Basic Law: Human Dignity and Freedom has preserved the validity of old legislation, but not its meaning.**

Of a similar opinion was Justice Dorner, who also sat in judgment in the case. The Honorable Justice M. Cheshin was of the dissenting opinion.

In the further hearing of the case, CrimFH 2316/95 *Ghanimat v. The State of Israel*, *Piskei Din* 49 (4) 589, the majority of the judges concurred in this opinion. President Barak ruled on the same matter, on p. 653:

> **Three days ago we ruled that a basic law is a constitutional, supra-statutory law; that it constitutes a superior norm in the normative hierarchy of the State of Israel, and that it is part of the constitution of the State of Israel (see CA 6821/93, LCA 3363[1] *United Hamizrahi Bank Ltd. v. Migdal Cooperative Village et. al.* (27)). The constitutional status of the basic law radiates to all parts of Israeli law. It too is inherent to its fabric. The constitutional radiation that is emitted from the basic law affects all parts of Israeli law. It necessarily affects also old law. True, the validity of old law is preserved. The intensity of the basic law's radiation thereon is, therefore, lesser than the intensity of its radiation on new law. The latter could be repealed if it is inconsistent with the provisions of the basic law. Old law is protected against nullification by a constitutional shield. But old law is not protected against a new interpretational conception with regard to its meaning. Indeed, a material transformation has occurred in the Israeli legal field upon the enactment of the basic laws on human rights. Every legal plant growing in this field is affected by this transformation. Only thus will**

[1] Translator's note: Should be 3363/94.

> **harmony and unity be achieved in Israeli law. The law is a system of connected vessels. A change in one of these vessels affects them all.**
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> **It is impossible to distinguish between old law and new law with regard to the interpretational impact of the basic law. Indeed, any administrative discretion that is conferred by old law, should be exercised in the spirit of the basic laws; any judicial discretion that is conferred by old law, should be exercised in the spirit of the basic laws; and in general, every statutory norm should be construed in light of the basic law.**

Most scholars also believe that the basic law should have an effect on the analysis and construction of existing laws in general.

With regard to the courts' duty in light of the new basic laws, Prof. Barak says in his article "Kevod ha-Adam kiZkhut Huqqatit" [Human Dignity as a Constitutional Right], *Hapraklit* 41, 271, on p. 286, as follows:

> **Human dignity as a supra-statutory, constitutional right imposes a heavy task on the courts… when fulfilling their constitutional duty, the courts shall exhibit judicial objectivity. It is not his own subjective values that the judge shall reflect, but the values of the State of Israel as a Jewish and democratic state. In doing so, the judge will act, in difficult cases, according to the basic conceptions of the "enlightened public" in Israel. He will thus express the general public conscience, the social consensus, the legal ethics, the basic principles and the critical conviction of the Israeli society on proper and improper behavior.**

Prof. A. Barak expanded on this matter in his book, *Parshanut ba-Mishpat* [Interpretation in Law], vol. 2, *Parshanut Huqqatit* [Constitutional Interpretation] (Jerusalem, 1994) (hereinafter: A. Barak: *Constitutional Interpretation*), on p. 247:

> **It is the right of every person to leave Israel. "This right is derived from the freedom of man and from the nature of the**

> **state as a democracy, and from our being part of the international community, in which the right of movement is recognized as a customary right". The Basic Law: Human Dignity and Liberty has granted the right of movement a supra-statutory, constitutional status, by determining that "every person is free to leave Israel". This right, like any other human right, is not absolute. It may be limited for the sake of public peace and safety…**

On p. 428 he adds that:

> **The value of human dignity and liberty is based upon the autonomy of personal will, on the freedom to develop the personality and on the recognition of the individual's freedom of choice. The right of individuals to move about freely within and outside the boundaries of their state is derived herefrom.**

The formula for balancing between the freedom of movement on the one hand, and national security on the other hand, was set forth in HCJ 448/85 *Dahir v. The Minister of the Interior*, *Piskei Din* 40 (2) 701. In that case, an order was issued against the petitioner for fear that if he left the country he would meet with hostile entities and compromise national security. In that matter, it was determined that an order should be issued in the face of a "genuine and serious fear" that the petitioner's departure from the country would compromise national security.

However, as I stated at the outset, even if we were to assume, as did the Plaintiff, that this test had been met and that he had lawfully been prohibited from leaving the territories (on the applicability of the authority's duties in the territories, see A. Barak, *Constitutional Interpretation*, id., on p. 452), I am not convinced that had the respondent [sic] been notified that the permit that was issued to him had been revoked, national security would have been compromised.

The duty of honoring human rights is imposed on all governmental authorities (see A. Barak, *Constitutional Interpretation*, p. 448). What this means is that human rights are to be considered as part of the discretion exercised by the authority within its powers. As I stated at the outset, in this case the Plaintiff did not dispute the authority's authority to limit his

freedom of movement. The Plaintiff accepted the adjudicated test, whereby his freedom of movement may be limited on grounds of national security.

However, did the authorities not breach their duty by choosing not to notify the Plaintiff that the permit he was given to leave the country had been revoked? In my opinion, the authority failed to consider, as part of the considerations it was required to consider, the human right to dignity, so that the Plaintiff should not arrive in vain at the border with all of his friends – them continuing on their way to the sports tournament and he being left behind. The injury caused by the mere denial of his departure is sufficient; the Plaintiff should not suffer further injury, where such injury is unnecessary.

Should the duty be imposed on the authorities in this case?

I must now consider whether this duty should be denied due to any policy grounds. I believe that in this case, the duty should be imposed also in view of the tests determined for this purpose in case law.

The tests for imposing the duty were determined in CA 593/81 *Ashdod Car Works Ltd. v. Tsizik, Deceased*, *Piskei Din* 41 (3) 169, 184:

> **When the court lays down rules for the imposition of liability in the tort of negligence, it does not do so arbitrarily, but by balancing different interests. It cannot be ignored that the non-imposition of liability on a defendant constitutes the determination of a legal norm no less than imposing liability thereon… the considerations which the court must take into account in this matter are numerous and diverse… (a) What was the probability that the damage would occur? (b) What might have been the expenses involved in preventing the risk? (c) How severe were the foreseeable damage or injury? (d) What is the social value of the conduct that caused the risk? (e) Who was in the best position to prevent the risk? (f) Who profited the most from the risk-causing act? (g) What is the level of caution that others would generally have used with respect to similar risks? (h) Under the circumstances, is a particular level of caution required by statute? Obviously, this is not a closed**

> **list of considerations, and it may be added to or shortened according to the circumstances of the case.**

In the case before me, the question arises as to whether the Civil Administration in the territories is required to notify a person, who requested and received an exit permit, that the permit had been rescinded. I shall examine the question of whether the duty should be imposed in accordance with the foregoing tests. Can and should the Civil Administration foresee that once it had notified a person that his exit from the region had been approved, and given no notice that the permit had been revoked, such person will suffer damage? The answer to this question is provided by the predictability test set forth in Article 36 of the Torts Ordinance (New Version). The question is whether a reasonable person should have anticipated the occurrence of the damage. In my opinion, as I specified above, under the circumstances of the case, when an exit permit to participate in a sporting delegation is requested and granted, and then revoked several days after its issuance and before the departure, a reasonable Civil Administration official should have foreseen that if such a person is not notified that the permit he was granted was revoked, he will suffer damage.

As for the other questions: the difficulty in preventing the risk, both administratively and economically: I believe that there is, in this case, no particular difficulty, and that the determination of this duty does not impose an excessive burden on the authority. In the balance of interests, it should be taken into account that human dignity is weighed against an administrative duty of giving notice by any means (telephone, telegram, etc.) to the Plaintiff, the sports club or HaMoked: Center for the Defence of the Individual, which applied for the permit in his name, that he will not be able to leave. In this balance of interests, there is room to recognize that a duty is imposed on the authority to give notice, in such a case, of the change in its decision.

In my opinion, there is no fear, as the Defendant's counsel claimed, that such a duty would impair the functioning of the Civil Administration. See, on this matter, the opinion of the Honorable Justice A. Barak in the *Suhan* case, id., at p. 741:

> **The police is required to act skillfully like anyone else. We are not imposing thereon duties to which it is not in any case subject. We do not believe, therefore, that any interference would be caused to the work of the police. On the contrary: it is our hope that in light of our decision, the persons authorized therefor will ensure that the guidelines and rules**

are actually observed, thus benefiting the police itself, its functioning and the public's faith therein.

The same is true in our case. The Defendant's counsel did indeed claim in his summations that "the State has not the tools, in view of the numerous applications that are filed, to start locating the applicant to notify him of the denial or the permit". However, the State's counsel has confirmed that when a person applies for a permit, he is given an answer. Therefore, it is not all of the cases in which an application is filed with which we are concerned, but that case in which another decision is made after the permit is granted. As the person referred to as Yosi testified, the cases in which one decision is made, and thereafter modified, are not many. In such cases, the Civil Administration is obligated to give the person who applied for the permit notice thereof. Such an obligation does not impose a heavy burden on the Civil Administration, but requires it to act in an orderly manner and not to injure the residents of the region more than is necessary. It is sufficient that the Plaintiff's freedom of movement is being restricted, there is no need to cause him damage by failing to timely notify him of the change in the decision in his case.

The Defendant's counsel posed the question of what would have been the case had the change in the decision been made in proximity to the Plaintiff's arrival at the bridge. In such a case, I would have insisted upon the existence of the duty, but would probably have ruled that the authority was not negligent, since it was unable to give notice of the change. However, in the case before us the change in the decision was made three days prior to the Plaintiff's exit from the country, so there was no impediment to notifying the Plaintiff of the change.

Another claim of the State's counsel in his summations was that the permit was given for May 1, whereas in practice the Plaintiff left five days later. He claimed that whoever had decided to change the permit believed that the Plaintiff had already left the region, and therefore did not notify the Plaintiff of the change. I cannot accept this claim. First, the permit was not issued for a particular date, but for departure from such date forth. Second, from the testimony of the person referred to as Yosi it appeared that the reason why the Plaintiff was not notified of the change was the fear that such a notice would compromise the source which provided the intelligence that caused the permit to be revoked. Therefore, from the factual point of view the State's counsel's argument is unfounded. Third, even had a factual foundation substantiated such a claim, then if the person who issued the order had believed that the Plaintiff had already left the country, he would, no doubt, not have issued it, since it would in any case have been pointless. In other words, the fact that the person who decided on the

change actually made the decision indicates that he had checked and found out that the Plaintiff had not yet left, and if so, he was once again subject to the obligation of giving him notice of the change in the decision. As the Defendant's counsel himself stated in his summations: "these people have a great deal of work, and need to check the computer to see whether he has or has not left." I do not believe that a simple computer query is an insurmountable task, which justifies an injury to the dignity and liberty of man.

Another argument of the State's counsel was that, had the Plaintiff called, he would have been told that the permit was revoked. Well, first, if notifying the Plaintiff that the permit had been revoked was risky, as the Defendant has claimed, then how would he have been notified thereof if he had called of his own initiative? This argument only strengthens my conclusion that giving notice of the revocation of the permit entailed no security risk. Second, this is not a case in which several months, or even several weeks, elapsed between the issuance of the permit and the departure, in which case it is possible that a reasonable person should have called to check whether the permit was still valid. In this case, the Plaintiff left several days after having received an exit permit, and he had no reason to think that the decision would be changed in such a short period of time.

The damage:

The Plaintiff stated, and this statement was not refuted, that his travel expenses to the bridge and back amounted to NIS 200. The Plaintiff claimed another NIS 5,000 for the distress he suffered.

On the issue of damage, the State's counsel claimed that the Plaintiff suffered no damage other than his travel expenses, seeing that he is a Hamas member and should have expected that such a thing would happen to him. The State's counsel says in his summations that "there is a strong feeling here of a Hamas member, attempting to get compensation. Had he been a 50-year old citizen traveling to his daughter's wedding, things would have been different…". Well then, first, the failure to give notice is not punishment for the Plaintiff's membership in Hamas, had it been proven. In the past, the Plaintiff admitted to being a member of this organization and has even served a prison sentence therefor. The intelligence on the *prima facie* suspicions against him arrived later. These suspicions were sufficient to prevent him from leaving the country. In view of the suspicions, staying his exit was indeed required. But there is no room to infringe upon the dignity of a person as such, be he a Hamas member or an innocent, 50-year old citizen, more than is necessary. What is necessary is to stay his exit. It is not necessary not to give him timely notice thereof.

However, it does not appear to me that the damage that was caused was so high, since the Plaintiff asked to leave before and was refused, and in view of the fact that he could have, to some extent, foreseen that in view of his past problems would arise, the level of distress should not be assessed at the high end of the scale.

In conclusion, I hereby rule that the Civil Administration authorities were required to notify the Plaintiff, after having granted him a permit to exit to a sports tournament, that the permit had been revoked, before his arrival at the Allenby Bridge. By failing to notify him of the change the State was negligent, and must compensate the Plaintiff in the sum of NIS 200 plus differences of indexation and interest as set out in the law from the date of filing of the complaint until the date of actual payment full, for the travel expenses, and in the sum of NIS 500 for the distress he suffered. This sum shall bear differences of indexation and interest as set out in the law from today until actual payment in full.

The State shall further bear the Plaintiff's trial expenses and attorney's fees in the total sum of NIS 3,000 plus VAT., as set out in the law. This sum shall bear differences of indexation and interest as set out in the law from today until actual payment in full.

Right to appeal to the District Court in Jerusalem within 45 days from today.

Issued today, 17 Tammuz 5761 (8 July 2001), in the absence of the parties.

The court clerk's office shall serve copies on the parties' counsel.

Publication permitted from 8 July 2001.

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Justice Dr. Mikhal Agmon-Gonen