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At the Supreme Court in Jerusalem
Sitting as the High Court of Justice

H CJ 11858/04

In the matter of:

1. **A minor boy**, by his mother, Petitioner 2
resident of Hebron
2. **_____ Al-Khatib**
resident of Hebron
3. **HaMoked: Center for the Defence of the Individual
founded by Dr. Lotte Salzberger (Reg. Assoc.)**

all represented by attorneys Gil Gan-Mor (Lic. No. 37962) and/or Yossi Wolfson (Lic. No. 26174) and/or Manal Hazzan (Lic. No. 28878) and/or Adi Landau (Lic. No. 29189) and/or Leena Abu-Mukh Zuabi (Lic. No. 33775) and/or Shirin Batshon (Lic. No. 32737) and/or Hava Matras-Irron (Lic. No. 35174) and/or Sigi Ben-Ari (Lic. No. 37566)
of HaMoked: Center for the Defence of the Individual
founded by Dr. Lotte Salzberger
4 Abu Obeidah Street, Jerusalem 97200
Tel. 02-6283555; Fax 02-6276317

The Petitioners

v.

Commander of the IDF forces in the West Bank

The Respondent

Petition for Order Nisi

A petition is hereby filed for an Order Nisi directed to the Respondent, ordering him to appear and show cause why he does not permit Petitioner 1 to enter Israel accompanied by his mother, Petitioner 2, to undergo a necessary medical examination to prove his injuries in his claim for damages currently being heard in the Magistrate's Court (hereinafter: the Claim).

The factual background

The parties

1. Petitioner 1 (hereinafter: the Petitioner) is a *seventeen-year-old Palestinian youth*, a resident of the Fawwar [refugee] camp, Hebron District. Petitioner 2 is his mother.
2. Petitioner 3 (hereinafter: HaMoked: Center for the Defence of the Individual or HaMoked) is a human rights non-profit organization, whose offices are in Jerusalem.

3. The Respondent holds the West Bank under belligerent occupation on behalf of the State of Israel. He has the authority to permit the entry of Palestinians into Israel.

The Petitioner's case

4. On 19 April 2004, the Petitioner, filed, through his attorney from the office of Attorney Qufti, a claim for damages in the Jerusalem Magistrate's Court against the State of Israel and the IDF (CAApp (Magistrate's – Jerusalem) 5418/04, *Al-Khatib v. The State of Israel et al.*).

A copy of the Complaint is attached hereto as Appendix P/1.

5. The Claim involves an incident that occurred in 2001, when he was fourteen years old. The youth sustained a serious injury to his chest while he was in gym class in the yard of the school where he was studying.

6. According to the Complaint, eyewitnesses testified that IDF soldiers who were stationed at the nearby checkpoint at the time of the incident aimed their rifles in the direction of the school.

7. On 9 December 2001, the Petitioner's counsel from HaMoked: Center for the Defence of the Individual sent a letter of complaint to the Judge Advocate General's office, requesting that the serious matter be investigated.

A copy of the letter is attached hereto as Appendix P/2.

8. On 26 December 2001, the acting judge advocate for the Central Command, of the Judge Advocate General's office, indicated that the complaint had been received and was being investigated.

A copy of the letter is attached hereto as Appendix P/3.

9. The Petitioner and others involved expected that the complaint would be seriously and thoroughly investigated within a reasonable time. They soon understood otherwise. Despite numerous reminder letters and entreaties by HaMoked, days, weeks, and years passed, and the complaint's status remained unchanged – it was “being handled,” first by the Military Police investigation unit, and, beginning in November 2003, by the Judge Advocate General's office. It took until 7 December 2004, *three years after the complaint was submitted*, before a response was received from the Judge Advocate General's office. The reply stated that there was insufficient evidence and that the file had been closed.

A copy of the notification of 7 December 2004 is attached hereto as Appendix P/4.

10. As mentioned above, on 19 April 2004, the Claim was filed. Following the amendment to Hoq ha-Neziqin ha-Ezrahiyyim (Ahrayut ha-Medina) [Torts Law (State Liability)], 5712 – 1952, which reduced the period of limitation, the Petitioner was unable to wait until the completion of the investigation.
11. The complaint specifies the Petitioner's medical damages: "Serious injury to the chest and left lung and from [*sic*] total paralysis of his left limb." In the damages section, the Petitioner contends that, "the Plaintiff has remained, as mentioned above, with a high degree of permanent disablement as a result of injury to his chest, lung, and paralysis of his left limb. The Plaintiff suffers and will continue to suffer from constant pain and will require medical and medicamental treatments, psychological as well as physical, for his entire life."

Medical documents testifying to the severity of his injuries were attached to the Claim (Appendix P/1). The Petitioner reserved the right to attach a medical opinion to prove his damages.

12. The court ordered the Petitioner to submit a medical opinion by **19 August 2004**. At the time, the Petitioner was hospitalized in Paris, so an application was filed, on **26 July 2004**, to extend the time for filing the medical opinion until the end of September 2004, or later. On 28 July 2004, the Magistrate's Court granted the application.

A copy of the court's rulings and the application of the Petitioner's counsel are attached hereto as Appendixes P/5 - P/7.

13. The Petitioners' counsel in the civil action requested HaMoked to arrange the Petitioner's entry to Jerusalem so that he could be examined by Professor Z. Argov, an expert in neuromuscular diseases and a member of the Hebrew University Medical School. Prof. Argov gave the Petitioner an appointment for 21 November 2004, and requested that, because of the youth's age, he be accompanied by an adult.

A copy of the confirmation of the appointment for the examination is attached hereto as Appendix P/8.

14. On 8 November 2004, HaMoked wrote to the office of the legal advisor of the Respondent, requesting that the Petitioner, accompanied by his mother, Petitioner 2, be allowed to enter Israel.

A copy of the request is attached hereto as Appendix P/9.

15. On 14 November 2004, notification was received from the legal advisor that Petitioner 2 would be given an entry permit.

A copy of the letter is attached hereto as Appendix P/10.

16. **On 17 November 2004, notification was received from the legal advisor that the Petitioner would not be allowed to enter. The letter stated that the refusal was based on security grounds. The legal advisor did not specify the specific security reasons for the refusal.** Because the Petitioner was not permitted to enter, the permit given to Petitioner 2 was cancelled.

A copy of the letter is attached hereto as Appendix P/11.

17. In light of the reply received from the legal advisor, the Petitioner was denied the possibility to provide a medical opinion by a respected Israeli expert, a failure that was likely to harm severely the Petitioner's claim, and even lead to its dismissal. The Petitioner felt that he had been wronged – not only had he been severely injured and continued to suffer from his injuries, not only did the authorities fail to investigate the incident expeditiously, but took three years to complete it, not only did the authorities fail to prosecute the persons who caused his injuries, not only was he compelled to file his claim hastily because of the shortened time given to file claims of this kind – now the very ones who are ostensibly responsible for his severe injuries are preventing him from seeking the only lawful redress available to him – conducting the civil suit.

The legal argument

The importance of the medical opinion for the Petitioner to obtain relief

18. The medical opinion is of paramount importance in civil claims. Rule 127 of Taqqanot Seder ha-Din ha-Ezrahi [the Rules of Civil Procedure], 5744 – 1984, states:

Where a litigant wishes to prove a medical matter to establish one of his contentions, he shall attack to his pleadings a medical certificate or expert's opinion, as the case may be, drawn pursuant to Article 24 of Pequddat ha-Re'ayot (Nosah Hadash) [Evidence Ordinance (New Version)], 5731 – 1971 (hereinafter: an opinion); however, the court or registrar may exempt a litigant from attaching an opinion for special reasons that shall be recorded.

Prof. Avraham Sahar discussed the importance of the medical opinion:

A medical expert is a central axis in every hearing in which it is necessary to locate the cause of disease or bodily injury, and the expert's opinion is a necessity in proving the causal

connection between the injury and the consequences – the damages... In extremely rare instances, the court exercises its power and grants the plaintiff's request to exempt him from his obligation to submit a medical opinion.

Prof. A. Sahar, *Dine Edut Mumh̄im: Iqqarim, Sidre Din weEtiga* [Laws of Expert Testimony, Fundamentals, Rules, and Ethics] (Tel Aviv, 2003), 233.

19. **The sanction** for failing to comply with this provision is set forth in Rule 137, “Non-compliance with Rules”:

(a) Where a litigant does not do as provided in Rule 127 or Rule 128(b) and the court or registrar has not exempted him from such, the court shall not entertain medical proof on his behalf on the matter in question.

20. A plaintiff who is rendered incapable of providing a medical expert's opinion suffers great damage in making his claim, and the lack of a medical opinion can cause him to lose his entire claim. Such failure to provide the opinion harms the plaintiff's right to obtain relief for the violation of his rights and his right to access to the courts.

Violation of the right to relief

21. The right to relief is a human right, which results from the belief a person whose rights have been violated is entitled to compensation. The right to relief is a constitutional right:

The fundamental point of departure is that the physical violation of a constitutional right must draw with it an appropriate remedy. The relief is a function of the right. The principle is that where a right exists, a remedy also exists. Where the right exists – the relief exists (*ubi ius ibi remedium*). This principle applies to every infringement of constitutional rights, whether normative or physical. If the constitutional right of a person – to dignity, to liberty, to privacy, to movement, or to property – is physically violated, the individual is entitled to an appropriate remedy (A. Barak, *Parshanut ba-Mishpat (Parshanut Huqqatit)* [Interpretation in Law (Constitutional Interpretation)]: p. 779).

22. The law of damages is the main source of relief for physical injury to protected rights of the individual:

Israeli private law, in general, and the law of damages, in particular, are the primary source for the granting of relief for (physical) violation of a protected human right... The Torts Ordinance is the source for the relief, while the right is enshrined in the Basic Laws (*Interpretation in Law*, cited above, at p. 785).

23. The right to relief is also recognized in international law. Article 2(3) of the International Covenant on Civil and Political Rights, 1966, to which Israel is party and has ratified, in 1991, states:

... any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

On the application of this covenant in the Occupied Territories, see the opinion of the International Court of Justice, in The Hague, in the matter of the construction of the Separation Fence, pp. 40-43, Paragraphs 102-111.

24. The Petitioner suffered severe bodily injury by IDF soldiers while he was playing in the schoolyard. He continues to suffer from these injuries and expects to suffer from them in the future. These injuries violate his constitutional right to bodily integrity, a right enshrined in Articles 2 and 4 of Hoq Yesod: Kevod ha-Adam we-Heruto, [Basic Law: Human Dignity and Liberty]:

There shall be no violation of the life, body or dignity of any person as such.

All persons are entitled to protection of their life, body, and dignity.

That is, the Respondent not only has the duty not to harm the body of the Petitioner, he also has the duty to act to protect it. The Respondent's duty to protect the Petitioner and his bodily integrity is also enshrined in international law, particularly in Articles 43 and 46 of the Hague Regulations, and in Article 27 of the Fourth Geneva Convention.

25. The injury also resulted in the commission of other violations of the Petitioner's rights, and there is reason to fear that these violations of his rights will continue, among them his right to education, to work and gain a living, and his right to security.

26. **The Petitioner is entitled to relief that will compensate him for the violation of his rights. The Petitioner is entitled to attain this relief by filing a complaint for damages. The Petitioner is entitled to ensure that the Respondent will respect his constitutional right to relief, and that the Respondent will not impede or frustrate this right by these or other means.**

Removal of the relief or failure to recognize a remedy violates a constitutional right similar to the initial violation of the constitutional right (*Interpretation in Law*, cited above, p. 705).

Infringement of the right to equality in judicial proceedings

27. A fundamental principle of Israeli law is that litigants are equal before the courts, both when confronting each other in court and in relation to other litigants. This is a customary principle of law that has existed for many years in all legal systems that seek justice. This principle results from the principle of general equality, from the right to due process, and from the right to access to the courts. This last right is recognized as a constitutional right in many judgments, and it includes within it the right to **open and efficient access** to court:

The common law recognizes this right as a fundamental right even though it is not written in a basic law. The purpose of the right is to ensure that an individual who has a cause of action is given access to court to investigate his matter. Indeed, “open and efficient access to court is a fundamental right, even if still unwritten in as a basic law, and the court is supposed to protect it as it protects other fundamental rights... Public policy demands that the way to court must be open, so that the court can decide legal disputes...” (CA 6805/99, *General Talmud Torah and the Yeshiva v. Local Committee, Piskei Din 57 (5) 433, 446*).

28. International law also requires the courts to refrain from discriminating between litigants. Article 14 of the International Covenant on Civil and Political Rights, noted above, states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be

**entitled to a fair and public hearing by a competent,
independent and impartial tribunal established by law...**

29. In reality, the lack of general equality in society is also found in the system of justice. Studies and critical theories have proved time and again that litigants are not treated equally, that litigants are treated differently, based on their ethnic origin, race, sex, economic status, and other grounds. However, this does not lessen the honest efforts of judges to limit, as best they can, the gap between litigants. For example, the laws enable judges to assist a litigant who is not represented by counsel, and may even appoint an attorney for the litigant. Courts have also acted to prevent economic constraints from denying a litigant access to court, for example by exempting the litigant from paying the filing fee or giving a guarantee.
30. As for our case – **the Petitioner has encountered, time and again, hardships that place him in an unequal situation in his action against the other litigant – the state – and vis-à-vis other litigants in Israel.**
31. From the start, the Petitioner was discriminated against in comparison with other plaintiffs in Israel, when the legislator enacted the Torts Law (State Liability), his procedural rights were gravely impaired. The period of limitations to file a complaint fell from seven years to two years. This reduction compelled the Petitioner to file his complaint before he obtained the findings of the criminal investigation. Also, the Petitioner could not wait for all his medical damages to be determined.
32. Now, even after the Petitioner had managed to overcome the harsh procedural barrier and the other hardships – language, maintaining contact with his counsel, the difficulties resulting from the failure to conduct a proper investigation – and filed his complaint, the Respondent placed another stumbling block before him, by refusing to enable him to be examined by a medical expert in Israel. As an aside, it can also be said that, so long as the Respondent maintains his position, it is unlikely that the Petitioner will even have a hearing on his claim and an opportunity to testify in his matter.
33. It should not be forgotten that the party responsible for frustrating the Petitioner's action – the Respondent – is an arm of the State of Israel, which is the defendant in the action and an interested party. Only because of the ostensible conflict of interest and the fear of slanderous comment, the Respondent should have given serious consideration to his position, and, at least, **explained his refusal in great detail.**
34. When the court encounters discrimination against litigants in gaining access to the courts and protecting their rights, the court must eliminate the discrimination.

See, for example, MAR 6857/00, *Rota v. Nitzbatelyb, Taqdin Elyon* 2000 (3) 718.

35. In this matter, the comments of Judge Gh. Jarjura, of the Haifa District Court, in which he was compelled to dismiss a claim for damages of a resident of the Occupied Territories because of the authorities' refusal to permit him to enter Israel, are appropriate:

I shall take this opportunity to observe that this is not the only case in which plaintiffs who reside in the Palestinian Authority and filed complaints in courts in Israel are unable to appear at hearings or for medical examinations, a situation that leads not only to the cancellation of court sessions for the taking of testimony for quite some time, but also impairs the rights of these litigants, and I won't say more. I think that the time has come for the matter to be handled properly so as to put an end to the suffering of the plaintiffs (CAApp (Haifa - District) 1131/99, *Shabir v. The State of Israel*, judgment of 10 December 2004).

Disproportionate breach of the Petitioner's rights

36. Like all rights, the right of the Petitioner to relief, to equal treatment as a litigant, and open access to the courts are subject to limitation. However, in that the rights violated in this case are so fundamental, there must be substantial security reasons to enable the limitations to continue in effect.
37. It is hard to conceive the substantial harm to security that may result from the entry of a minor accompanied by his mother to Jerusalem to visit a medical expert. The Petitioner turned to an Israeli court for relief, and his matter is being handling according to law. The fear that the Petitioner will do something that will endanger his chances to fully pursue his claim is baseless.
38. In any event, as regards proportionality, the Respondent can take a less restrictive measure, one that will enable the Petitioner to obtain the expert's opinion and simultaneously meet the security demands. In the past, for example, the Respondent allowed Palestinians to be escorted into Israel [by security forces].

Attached hereto is an affidavit signed by the Petitioner's counsel, Attorney Mahagna, in the civil action, in the course of which the Petitioner seeks to enter Israel to obtain a medical opinion.

In light of the above, the court is requested to issue an Order Nisi as requested in the beginning of this petition, and after hearing the Respondent's response, to make it absolute. Also, the court is requested to order the Respondent to pay the Petitioners' costs and attorneys fees.

27 December 2004

Gil Gan-Mor, Attorney
Counsel for the Petitioners