At the Supreme Court Sitting as the High Court of Justice

HCJ 5268/08
HCJ 5399/08

Before:	**Honorable Vice President E. Rivlin** **Honorable Justice E. Hayut** **Honorable Justice Y. Danziger**
The Petitioners in HCJ 5268/08:	**_____ 'Anbar et. 14 al.**
The Petitioners in HCJ 5399/08:	**Adalah, Legal Center for Arab Minority Rights in Israel et 10 al.**
	v.
The Respondents in HCJ 5268/08:	1. **GOC Southern Command** 2. **Minister of the Interior** 3. **Minister of Defense** 4. **Coordinator of Government Activities in the Territories** 5. **Government of Israel** 6. **State of Israel**
The Respondents in HCJ 5399/08:	1. **Minister of Defense** 2. **GOC Southern Command** 3. **Minister of the Interior**

Petition for *Order Nisi*

Representing the Petitioners in HCJ 5268/08:	Att. Ben Ari Sigi; Att. Yossi Wolfson; Att. Abeer Jubran Daqwar
Representing the Petitioners in HCJ 5399/08:	Att. Fatma Al Aju; Att. Hassan Jabarin

Representing the Respondents: Att. Gilad Shirman; Att. Hila Gorney

Judgment

Justice E. Hayut:

The petitions at bar concern the general policy practiced by the respondents which forbids residents of the Gaza Strip (hereinafter also: Gaza) from entering Israel for the purpose of visiting immediate relatives who are incarcerated in Israel.

Factual background

1. Over the years, the competent officials allowed residents of Gaza to enter Israel for the purpose of visiting relatives incarcerated therein, in the absence of a security preclusion which was examined on an individual basis and according to additional criteria, including the age of the person seeking entry into Israel and the degree of relation to the person incarcerated. This policy continued after the termination of the military administration in the Gaza Strip on 12 September 2005. However, on 4 June 2007, shortly after the Hamas takeover of Gaza, the respondents began implementing a different policy, whereby residents of Gaza are forbidden entry to Israel for the purpose of visiting incarcerated relatives. Some three months thereafter, on 19 September 2007, the Security Cabinet of the Government of Israel (hereinafter: the cabinet), decided to impose certain sanctions on Gaza, including restrictions on the movement of people to and from Gaza (hereinafter: the cabinet decision). The decision stipulated as follows:

> Hamas is a terrorist organization that has taken control of the Gaza Strip and turned it into hostile territory. This organization engages in hostile activity against the State of Israel and its citizens and bears responsibility for this activity. In light of the foregoing, it has been decided to adopt the recommendations that have been presented by the security establishment, including the continuation of military and counter-terrorist operations against the terrorist organizations. Additional sanctions will be placed on the Hamas regime in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. Restrictions will also be placed on the movement of people to and from the Gaza Strip. The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the intention to avoid a humanitarian crisis. [emphasis added]

The petitions at bar are directed, as stated, against the general policy in practice since June 2007 whereby residents of Gaza are not permitted to enter Israel for the purpose of visiting relatives incarcerated herein.

The parties' arguments

2. Petitioners 1, 3 and 5 in HCJ 5268/08 are residents of the Gaza Strip who are incarcerated in various prison facilities in Israel and request that their immediate relatives living in Gaza be permitted to enter Israel in order to visit them in prison. Petitioners 2 and 4 in HCJ 5268/08 and petitioners 4-11 in HCJ 5399/08 are residents of the Gaza Strip requesting the respondents allow them to enter Israel in order to be able to visit their immediate relatives who are incarcerated therein. The rest of the

petitioners, numbering 13, are Palestinian and Israeli movements and associations working to promote human rights.

The petitioners are of the opinion that the sweeping policy practiced by the respondents which prevents residents of Gaza from entering Israel for the purpose of prison visits without conducting individual screenings constitutes prohibited and unlawful "collective punishment" which infringes on the vested rights of the prisoners and their relatives living in the Gaza Strip. The petitioners claim, *inter alia*, that the policy results in the violation of the right to visits from relatives in prison facilities which is entrenched in Israeli and international law. The petitioners further claim that this policy infringes upon the constitutional rights of the prisoners and their relatives to family life and freedom and the prisoners' constitutional right to a minimal standard of living in human dignity, as they do not currently receive various basic goods in prison (clothes, shoes, and money which is used for buying products in the "cantine"). In the past these items were deliverable by visiting relatives. The petitioners further add that the policy which prevents visits from Gaza in prisons was implemented without a legal source and infringes on prisoners' rights beyond necessity. According to the petitioners' claim, imposing restrictions on entry into Israel must be carried out on a case by case basis and following individual screening. They note that in the past, the visits were conducted with the assistance of the International Committee of the Red Cross (hereinafter: the Red Cross) which performed the necessary coordination with security officials and also organized and funded shuttles to prison facilities. The petitioners argue that it is possible to continue to make the visits possible with the assistance of the Red Cross whilst providing a solution to the security risks.

3. On the other hand, the state claims that the general policy prohibiting visits from the Gaza Strip in prisons inside Israel is currently implemented pursuant to the decision of the cabinet, which constitutes a "state directive" for guiding competent officials on how they are to implement the laws governing entry into Israel vis-à-vis movement of people from Gaza. According to the state, this cabinet decision was made after considerations which are clearly state matters and concern foreign relations and security, were weighed. As such, and given the broad discretion granted to the government in such matters, the state is of the opinion that the petition is to be rejected *in limine*. On the merits, the state claims that the cabinet decision is "a basic act of war" which forms part of the general policy vis-à-vis the Hamas regime in Gaza. It further notes that although the dominant element in this policy is a state matter, holding the visits at the present time also poses a security risk. In this context, the state notes the volume of movement expected at the crossings should the visits be renewed and the fact that residents of Gaza are a "higher risk" in the current circumstances. It notes that the various security risks cannot be negated even if the visits are renewed with the assistance of the Red Cross. The state further claims that the policy practiced pursuant to the cabinet decision is not "collective punishment" as understood in international law, but the execution of the sovereignty of a state which may choose who enters it, particularly in the context of a conflict between it and the hostile entity among whose population those wishing to enter it are counted. The state also claims that it is under no humanitarian obligation to allow Gaza residents to enter Israel for the purpose of visiting their relatives incarcerated therein, that Gaza residents have no legal right to enter Israel and that there is no flaw in the current arrangement which prohibits all Gaza residents from entering Israel for the purpose of prison visits. The state also notes however, that there are exceptional cases in which, even today, Gaza residents are allowed to enter Israel for the purpose of medical treatment or other special humanitarian reasons, yet this without Israel's being legally obliged to do so. As for the petitioners' claims regarding infringement on the rights of the prisoners as a result of the prohibition on their relatives' entry into Israel, the state claims that no person in Israel, whether he is a citizen, a resident or a person incarcerated therein, has a vested right that a foreigner be permitted to enter Israel in order to visit him, particularly when what is at issue is entry into Israel from the territory of a hostile entity, as aforesaid. In any case, claims the state, even if the policy does result in an

infringement on the prisoners' rights, it is a policy which is implemented in accordance with the laws governing entry into Israel and with Israeli basic and primary legislation.

Review

4. As stated, the policy which is the subject matter of the petitions at bar and which is implemented by the respondents is based on the cabinet decision regarding the imposition of certain sanctions on the Gaza Strip and on the movement of people to and from it. This decision has been previously examined by this court in matters relating to the reduction in the supply of electricity and fuel to Gaza (HCJ 9132/07 **Al Bassiouni Ahmad v. Prime Minister**, Sec. 2 (not yet published, 30 January 2008) (hereinafter: the Al Bassiouni case). It was made clear that the considerations weighed by the cabinet in its aforementioned decision were considerations of state and security. As known, the government has broad discretion in such matters, and the court does not generally intervene therein. The same is true regarding the policy which is derived from the decision and implements its spirit in practice. This approach is relevant also for the case at bar (on the issue of the government's broad discretion in matters of foreign relations and security in general and the Gaza Strip in particular, see: HCJ 1169/09 **Legal Forum for the Land of Israel v. Prime Minister**, Secs. 20-21 (not yet published, 15 June 2009); HCJ 2650/09 **Meatreal v. Minister of Agriculture** (not yet published, 1 April 2009); HCJ 5551/08 **Shalit v. State of Israel**, Sec. 5 (not yet published, 23 June 2008)).

5. The official vested with the power to implement the cabinet decision and establish the policy which is the subject matter of the petition is the commander of the Area, as defined in the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003. Pursuant to the provision of Article 3B of the law, he is permitted to grant a resident of the Gaza Strip a permit to remain in Israel temporarily for the purpose of medical treatment, work, or a temporary purpose not exceeding a cumulative period of six months (see on this issue HCJ 4487/08 **Physicians for Human Rights v. Commander of IDF Forces in the Gaza Strip, GOC Southern Command**, Sec. 7 (not yet published, 4 September 2008)). The premise in this context, and all the more so in view of the cabinet decision, is that no foreigner has a vested right to enter Israel and the state has broad discretion, pursuant to the principle of sovereignty, to decide who enters it and who is removed from it if he is no longer wanted (see: HCJ 482/71 **Clark v. Minister of the Interior** *Piskey Din* 27(1) 113, 117-118 (1972); HCJ 2828/00 **Kowalski v. Minister of the Interior** *Piskey Din* 57(2) 21, 27-28 (2003); AdmA 4614/05 **State of Israel v. Oren**, Sect. 5 (not yet published, 16 March 2006); HCJ 9722/04 **Polgat Jeans Inc. v. Government of Israel**, Sec. 6 (not yet published, 7 December 2006); AdmA 1038/08 **State of Israel v. J'avitz**, Sec. 9 (not yet published, 11 August 2009); and on the issue of entry into Israel from the Gaza Strip see: HCJ 1912/08 **Physicians for Human Rights v. Commander of IDF Forces in the Gaza Strip, GOC Southern Command**, Sec. 8 (not yet published, 16 April 2008); 9657/07 **Jarbu' v. Commander of IDF Forces in the West Bank** (not yet published, 24 July 2008)). At the same time, this discretion which is granted to the competent officials, despite being broad, is not absolute and it is incumbent upon these officials, as they periodically determine the policy to be implemented, to conduct a proper and up-to-date balance between all relevant considerations in order to refrain from infringing on human rights beyond necessity.

6. One of the considerations the competent officials must weigh in establishing the policy concerning entry into Israel from the Gaza Strip relates to the duties applicable to Israel vis-à-vis the civilian population therein. Over the years, substantial changes have occurred in the scope and nature of these duties. When Gaza was held under "belligerent occupation" the legal regime applicable therein was determined in accordance with the rules of international public law and the law, jurisprudence and administration of Israel were not implemented therein (for a review see HCJ 1661/05 **Hof Aza Regional Council v. Knesset of Israel**, *Piskey Din* 59(2) 481, 514-516 (2005)). On 12 September

2005, following the implementation of the disengagement plan from the Gaza Strip and northern Samaria, the GOC Southern Command issued a proclamation regarding the termination of the military administration and since then, the Gaza Strip is no longer under "belligerent occupation" as far as international law is concerned, and Israel has no effective control over what transpires in this territory (see the Al Bassiouni case, Sec. 12; CrimA 6659/06 **John Doe v. State of Israel**, Sec. 11 (not yet published, 11 June 2008)). As a result, the duties incumbent upon Israel vis-à-vis the civilian population have changed in substance and scope as compared to those incumbent upon it when the military administration was in place. The court examined the nature of these duties in the Al Bassiouni case by noting:

> Under these circumstances, the State of Israel bears no general obligation to concern itself with the welfare of the residents of the Strip or to maintain public order within the Gaza Strip, according to the international law of occupation. Israel also has no effective ability in its current status to instill order and manage civilian life in Gaza. Under the current circumstances, the primary obligations borne by the State of Israel with regards to the residents of the Gaza Strip are derived from the state of armed conflict that prevails between it and the Hamas organization which controls Gaza; its obligations also stem from the degree of control that the State of Israel has over the border crossings between it and the Gaza Strip; and also from the situation that was created between the State of Israel and the Gaza Strip territory due to years of Israeli military control in the area…(*ibid.* Sec. 12)

7. Considering all the aforesaid, I have not been convinced that in our matter there is cause to intervene in the decision of the competent officials, which established a general policy preventing the entry of Gaza residents into Israel for the purpose of prison visits. Permitting residents to enter Israel for this purpose is not among the basic humanitarian needs of Gaza residents which Israel is obliged to allow even today. What lies at the foundation of the policy implemented by the respondents are clearly considerations of state and security and it conforms to and effectively implements the cabinet decision made for these reasons. In this context, it would not be superfluous to stress that Israel's control over the border crossings with the Gaza Strip does not provide a solution to all the security risks involved in continuing the visits in light of the expected increased traffic through the crossings as a result of holding the visits and in light of the crossings' being a constant target for terrorist activities (compare, HCJ 7235/09 **HaMoked: Center for the Defence of the Individual v. GOC Southern Command**, Sec. 2 (not yet published, 16 September 209) (hereinafter: the HaMoked case)). Thus, as far as the rights of Gaza residents are concerned, we have not found a reason to strike down the policy practiced by the respondents (for similar cases where the general policy regarding Gaza and West Bank residents was under review see and compare: HCJ 7960/04 **Al Razi v. Commander of IDF Forces in the Gaza Strip** (unpublished, 29 September 2005); HCJ 11120/05 **Hamdan v. GOC Central Command**, Sec. 16 (not yet published, 7 August 2008); HCJ 5539/05 **'Atallah v. Minister of Defense**, Sec. 10 (not yet published, 3 January 2008); the HaMoked case). At the same time, it must be recalled that according to the cabinet decision, the sanctions on the Gaza Strip are to be implemented while considering humanitarian aspects and in this context, the state noted that in exceptional cases, the competent officials do allow Gaza residents to enter Israel, for instance in order to receive medical treatment or for other exceptional humanitarian reasons. One cannot rule out that the respondents would allow visits to prison facilities if there are humanitarian reasons justifying the same. The anchor for this is found, as stated, in the cabinet decision.

8. The petitioners further claim that the policy practiced by the respondents infringes on the rights of prisoners who are residents of the Gaza Strip beyond necessity, among these are the right to family life and to live in dignity and they refer, in this context, *inter alia* to various provisions of

international law which regulate the status of prisoners of war, inmates and detainees and their right to have contact with relatives and meet with them in the location where they are held. These claims must also be rejected. As for the provisions of international law to which the petitioners referred, we accept the state's claim that these provisions do not deny a sovereign state the power to prevent foreigners, much less foreigners who are among the population of a hostile entity, from entering its territory even if such entry is meant for visiting relatives who are incarcerated by it. We also accept the state's claim that the policy which is the subject matter of this petition directly concerns a restriction on Gaza residents' entering Israel for the purpose of visiting relatives incarcerated here and not the prevention of the theoretical possibility of prisoners from the Gaza Strip receiving visitors in prison. In other words, inasmuch as the policy practiced by the respondents pursuant to the laws governing entry into Israel harms the prisoners, it is an indirect harm and the question is whether this indirect harm in and of itself justifies intervention in the respondents' policy. Indeed, security prisoners incarcerated in Israel have human rights and these must not be infringed beyond necessity. However, we do not think that the alleged harm to the prisoners justifies a revocation of or change to the practiced policy. This, given the fact that we are concerned, as stated, with indirect harm which is the result of a legitimate policy that restricts entry from the Gaza Strip to Israel at the present time, a policy in which we have found no cause to intervene, as well as given the fact that the possibility to receive visits in prison, regarding each prisoner, is subject to the existence of certain conditions and the broad discretion given in this context to the competent officials at the Israel Prison Service (see Sec. 47(b) of the Prison Ordinance [new version] 5732-1971).

Finally, as for the claim raised by the petitioners in HCJ 5399/08 that prisoners who are residents of the Gaza Strip do not receive basic goods and money to buy products in the "cantine" owing to the policy practiced by the respondents, the state clarified that the prisoners' relatives are able to transfer funds to them via a bank transfer, and it appears, that such a possibility, if it exists, does provide a response for the claim that was raised. In any case, inasmuch as this proves difficult, it is appropriate to find alternative methods allowing for the transfer of funds as aforesaid.

Conclusion

9. For all the reasons specified above, I will suggest that my colleagues reject the petitions with no warrant on expenses.

Justice

Vice President E. Rivlin:

I consent

Vice President

Justice Y. Danziger:

I consent

Justice

Ordered as stated in the judgment of Justice E. Hayut.

Given today, 29 Kislev 5770 (9 December 2009).

Vice President | Justice | Justice