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At the Supreme Court **HCJ 7834/04**
Sitting as the High Court of Justice

In the matter of:

1. **N. Abdallah**
2. **S. Abdallah**
3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

represented by attorneys Yossi Wolfson (Lic. No. 26174) 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-Ivron (Lic. No. 35174)
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 Army Forces in the West Bank

The Respondent

Petition for Order Nisi

A petition is hereby filed for an Order Nisi, directed to the Respondent and ordering him to show cause (if he so wishes):

A. Why he does not respond to the request of Petitioner 3 (hereinafter: HaMoked: Center for the Defence of the Individual) of 14 September 2003, that is, why he does not enable Petitioners 1 and 2 (hereinafter: the Petitioners) to visit the prisoner A. Abdallah (who is the son of Petitioner 1, and the spouse of Petitioner 2), or provide a detailed, written response why he does not allow the visit.

B. Why he does not meet his commitment (given in HCJ 11198/02) to respond to requests of this kind as soon as possible, by making an effort to provide a substantive response within thirty days.

The grounds for the petition

Preface

1. This is the tenth of forty-three petitions dealing with the systematic failure of the Respondent's legal advisor's office to respond to the requests of HaMoked: Center for the Defence of the Individual regarding residents of the Occupied Territories whom the Respondent has prevented from visiting their loved ones held in prisons in the West Bank and in Israel.

   This systematic failure reflects the Respondent's disgraceful attitude toward the fundamental rights of the prisoners and their families to contact and visits. The treatment of prisoners is one of the supreme tests of a society. In our case, the Respondent has the dual duty to ensure the prisoners' rights: first, whereas they are in his custody, he is responsible for all their human needs; second, whereas they are protected persons under international humanitarian law, he has the duty to ensure their welfare. The Respondent does not stand this fundamental test, as is apparent in the case of contact between the prisoners and their relatives: families from entire areas are prevented from visiting; entire families are not allowed to see their loved ones; when visits do occur, they are held in conditions that make meaningful, humane, and basic contact impossible. The Respondent does not allow the prisoners vacation, and does not permit them to contact their relatives by telephone. As a result, persons remain behind bars for years without any contact with their closest relatives. This ongoing situation has led the security prisoners, as we all know, to conduct a hunger strike. A substantial portion of the prisoners' demands relate to the basic right to contact with their family members. Therefore, the infringement of the fundamental rights of prisoners, which have become institutionalized in law, has already led the prisoners, out of despair, to take action. We find ourselves at the beginning of a road whose end nobody knows. The situation is unbearable. Rectifying it, including by means of this petition, should be given utmost urgency.

The parties

2. Petitioner 1, born in 1930, is a resident of Ad Duheisha.

   Petitioner 1's son, A. Abdallah (hereinafter: the prisoner) is currently being held as an administrative detainee in the Qezi'ot Detention Facility.

3. Petitioner 2, born in 1980, is the prisoner's wife.

4. The prisoner's mother is unable to visit him because of hr poor health. The prisoner's grandparents are deceased. According to the Respondent's criteria, only Petitioners 1 and 2 are allowed to visit him. In practice, as mentioned above, the Respondent prohibits them from visiting the son/husband, and the prisoner has not been visited by anybody.

5. Petitioner 3 is a registered non-profit association operating in the field of human rights and for many years has been involved in the matter of visits by residents of the Occupied Territories with prisoners from the Occupied Territories who are held in Israeli prisons.

6. The Respondent is the Israeli military commander of the West Bank, which Israel holds under belligerent occupation. Therefore, the Respondent has the obligation to ensure the exercise of the rights of the residents in the occupied territory under his responsibility (including the family members' right to visit in the prison) and to ensure proper living conditions, all in accordance with international humanitarian law, international human rights law, and Israeli constitutional law.

7. In practice, the Respondent does not himself ensure that the visits are held in the prisons. Rather, he does what is referred to as "outsourcing": the visits are held by means of transportation organized and funded by the International Red Cross, and where the visits take place inside Israel, they are accompanied by Israeli security forces. The visitors are required to obtain a permit from the Respondent. A person wanting to make a visit must make a request to the Respondent by means of the Red Cross, and the Red Cross delivers the permit that the Respondent issues (or the notice of rejection given by the Respondent) to the applicant. For a long time, no visits were held at all, and during 2003, the aforesaid arrangement was used, in one area after another, in most parts of the West Bank, except for Nablus District.

Exhaustion of proceedings

8. With the renewal of family visits from Bethlehem District, the Petitioners applied to the Respondent, through the Red Cross, to take part in the plan and visit their relative in the detention facility. Their request was rejected.

9. On 14 September 2003, HaMoked: Center for the Defence of the Individual wrote to the legal advisor of the Respondent and requested that arrangements be made to enable the Petitioners to visit their relative in the detention facility.

   The letter of 14 September 2003 is attached as Appendix P/1.

10. On 20 October 2003, HaMoked: Center for the Defence of the Individual sent a reminder letter.

A copy of the letter of 20 October 2003 is attached hereto as Appendix P/2.

11. On 30 November, another reminder letter was sent.

A copy of the letter of 30 November 2003 is attached hereto as Appendix P/3.

12. Another reminder was sent on 9 February 2004.

A copy of the letter of 9 February 2004 is attached hereto as Appendix P/4.

13. On 1 June 2004, Petitioners' counsel wrote to the High Court of Justice Department in the State Attorney's Office in a "pre-High Court of Justice petition" procedure, regarding the Petitioners and regarding forty-two other requests to remove prohibitions on prison visits, requests that had remained unanswered for many months.

In December 2003, the Respondent decided to ease his policy on preventing residents of the Occupied Territories to visit their loved ones in prison. Following this change, there was a decline in the number of residents who were classified as prohibited for security reasons from visiting their relatives in prison. However, the change in policy meant that staff work was required to arrange the visits of persons who were now allowed to visit. This staff work has not yet been completed, despite the many months that have passed. As a result, persons who have been advised that there are no security grounds forbidding their visits to a prison are in practice unable to make the visit. In his letter, Petitioners' counsel pointed out that he had the feeling that the responses in the Petitioners' case and in the cases of others like them were being delayed until the staff work was completed. "If this is the situation," Petitioners' counsel wrote, "the handling has been especially grave, constituting a combination of failure (regarding the establishment of the visiting arrangements) and of cover-up (by concealing the date in which the security grounds for refusal were removed) – possibly to make it more difficult to succeed in future suits dealing with the violation of my clients' rights.

A copy of the "pre-High Court of Justice petition" of 1 June 2004 is attached hereto as Appendix P/5.

14. On 21 June 2004, the head of the High Court of Justice Petitions Department wrote to Petitioners' counsel that the matter was presently in an advanced stage of handling.

A copy of the letter of 21 June 2004 is attached hereto as Appendix P/6.

15. On 8 July 2004, following a number of telephone calls, Mr. Shai Nitzan, Deputy State Attorney (Special Functions) wrote to Petitioners' counsel:

> **… My investigation reveled that, apparently, within a *week* a position will be formulated, at which time I shall update you *immediately.***
>
> **I regret the delay resulting from the complexity of the matter and suggest that you remain patient for another week.** (Emphases in original)

A copy of the letter of 8 July 2004 is attached hereto as Appendix P/7.

16. Petitioners' counsel waited patiently for a week.

17. Petitioners' counsel waited patiently for two weeks.

18. Petitioners' counsel waited patiently for three weeks.

19. Petitioners' counsel waited patiently for four weeks.

20. Three more weeks have passed.

21. Nothing has changed.

The legal argument

The obligation to respond within a reasonable time

22. One of the pillars of administrative law is the obligation of an administrative authority to respond within a reasonable time to requests sent to it. Efficient and expeditious handling of requests lies at the very foundation of proper administration.

23. The Respondent is required to handle requests submitted to him in a fair, reasonable, and expeditious manner.

> **The competent authority must act reasonably. Reasonableness also entails meeting a reasonable time schedule.**
> HCJ 6300/93, *Rabbinical Court Pleaders Training Institute v. Minister of Religious Affairs et al., Piskei Din* 48 (4) 441, 451.

See also CApp 4809/91, *Local Planning and Building Committee, Jerusalem v. Qehati et al., Piskei Din* 48 (2) 190, 219.

24. The Respondent's obligation to handle requests with due dispatch is incorporated in Section 4 of the Order Regarding Interoperation (West Bank Region) (No. 130), 5727 – 1967, which states:

> **An act whose time for performance is not set, or cannot be set, in defense legislation, shall be done with due dispatch and at such time that the circumstances set for its performance exist.**

25. According to the Amendment of Administrative Arrangements (Decisions and Reasons) Law, 5719 – 1958, a public official must respond to a request to exercise authority pursuant to law within forty-five days of receiving the request.

26. In HCJ 11198/02, *Dirriyya et al. v. Commander of Ofer Detention Facility*, the Court heard the matter of relatives who were prevented, for reasons of security, from visiting the detention facility. A consent application of 18 May 2003 filed by the parties with this Honorable Court, states, *inter alia*:

> **The respondents already state that, where a person is prevented** [from visiting]**, request may be made to the legal advisor of Respondent 2** [the Respondent in the present petition, Y.W.]**, and the request will be examined on an individual basis and a response given as soon as possible, and an effort will be made to provide a substantive response within thirty days.**

A copy of the consent application is attached hereto as Appendix P/8. The quotation is from Section 5(b) of the application.

27. In our case, the Respondent breached all the possible norms as regards giving response within a reasonable time – both those norms set forth in general administrative law, and those found in the military legislation, as well as those included in the commitment made before this Honorable Court. The deviation – the period exceeding reasonable time – is not modest; rather, we are witness to a general, sweeping policy of systematic failure to respond.

28. Delay in providing a response, especially where it apparently is used as a camouflage for actual denial of the request (in our case, also infringement of a substantive right due to reasons of administrative ineptitude), must have consequences. One possible consequence is the issuing of an Order Nisi and the transfer of the burden of proving the reasonableness of his conduct onto the shoulders of the Respondent.

See Y. Zamir, *The Administrative Authority,* Vol. 2 (Jerusalem, 5756 – 1996), at pages 716 and 726-727.

29. Ignoring the handling of requests and letting them gather dust in some binder or drawer constitute faulty administration, and reflect administration alien to the population that it serves, administration that, rather than serving the public and fulfilling its obligations, has become a callous tyrant that tramples on the rights relating to it, and crushes them in a bureaucratic maze.

The right of relatives to visit the prison and the Respondent's obligation to arrange the visits

30. The failure of the Respondent to respond to a request regarding prison visits is especially severe in that arrangement of the visits is an obligation imposed on the Respondent. This obligation follows from the fundamental right of the prisoners and their relatives.

31. The right to family visits in detention facilities is a fundamental right, both of detainees and of their family members. This is a basic right that results from the conception of humans as social creatures, who live in a family and community framework. It also results from the conception that the very matter of detention or imprisonment does not deny prisoner their fundamental rights: the prison walls restrict prisoners' freedom of movement, and all that such a restriction entails, but they do not terminate their other fundamental rights, except those that are expressly denied them by law. (See, for example, PPA 4463/94, PermPP 4409/94, *Golan v. Prisons Service, Piskei Din 50* (4) 136; PPA 4/82, *State of Israel v. Tamir, Piskei Din* 37 (3) 201; HCJ 114/86, *Weil v. State of Israel, Piskei Din* 41 (3) 477).

32. The right to visits in prison is incorporated in the Fourth Geneva Convention (which states, in Article 116, that, "Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible"). The right is also incorporated in the military legislation and in Israeli legislation applying to prisoners who are residents of the Occupied Territories.

33. The Standard Minimum Rules for the Treatment of Prisoners, 1955, states, in Article 37:

> **Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.**

34. The various provisions regarding the right to visits in prison permit restrictions on the right, including for reasons of security. However, like any restriction on a fundamental right, these restrictions must be reasonable and proportional, and must take into account the importance of the fundamental right being violated.

35. Denying detainees or prisoners family visits gravely harms their, and their families', fundamental right to family life. Society's attitude toward the right to family life was and is, at all times and in al cultures, a paramount value. In a long line of judgments, this Honorable Court has stated the supreme social importance of the family unit (CFH 2401/95, *Nahmani v. Nahmani, Piskei Din* 50 (4) 661; CA 5587/93, *Nahmani v. Nahmani, Piskei Din* 49 (1) 485, 500; CA 488/77, *John Doe et al. v. Attorney General, Piskei Din* 32 (3) 421, 434; CA 232/85, *John Doe v. Attorney General, Piskei Din* 40 (1) 1, 5; HCJ 693/91, *Efrat v. Director of the Population Registry in the Ministry of the Interior et al., Piskei Din* 47 (1) 749, 783).

The right to family life and its various aspects are also protected by the Basic Law: Human Dignity and Liberty (see CA 7155/96, *John Doe v. Attorney General, Piskei Din* 51 (1) 160, 175).

Family rights are also recognized and protected by international public law (see Articles 2 and 16(3) of the Universal Declaration on Civil and Political Rights, of 1948; Article 10(1) of the International Covenant on Economic, Social and Culture Rights, of 1966; Articles 17 and 23(1) of the International Covenant on Civil and Political Rights, of 1966). These provisions are part of international customary law, in that they are also part of general practice, which is accepted as law and is apparent from general principles of law that are recognized by cultured peoples. As a result, states are obligated by law to ensure the maximum degree of family experience, depending on the circumstances.

36. The obligation to arrange family visits in prison falls on the shoulders of the Respondent as part of his duty to ensure the exercise of the constitutional human rights of residents of occupied territory:

> **Along with the regional commander's responsibility for ensuring the safety of the military forces under his command, he must ensure the safety, security, and welfare of the residents of the region… The commander's obligation to ensure proper living conditions in the region covers all aspects of life … As part of his responsibility for the welfare of the region's residents, the commander must also act to**

provide proper protection of the constitution human rights of the local residents…

HCJ 10356/02, *Hass et al. v. Commander of IDF Forces in the West Bank, Takdin Elyon* 2004 (1) 2072, Paragraph 14

It goes without saying that the Respondent's obligation to protect the rights of residents of the Occupied Territories who want to visit their loved ones in prison is an active, "positive," obligation (HCJ 4764/04, *Physicians for Human Rights et al. v. Commander of IDF Forces in Gaza*, not yet published). This fact aggravates the severity of the actions taken by the Respondent, who has not even met his "negative" obligation not to prevent visits, in that all the technical arrangements and necessary effort to achieve it have already been done by the Red Cross.

37. Therefore, the Respondent has breached his obligation to handle the requests in a fair and reasonable manner (that is, his obligation to act in accordance with proper administration) and his obligation to ensure the exercise of the human rights of residents of the Occupied Territories (that is, his obligation under constitutional law and international substantive law).

In light of the nature of the relief requested, the petition is supported by the affidavit of the Client Advocacy Coordinator of HaMoked: Center for the Defence of the Individual.

For the above reasons, the Honorable Court is requested to issue an Order Nisi as requested at the beginning of the petition, and after receiving the Respondent's response, to make the order absolute, and to order the Respondent to pay the Petitioners' costs and attorneys fees.

Jerusalem, 26 August 2004

[signed]

Yossi Wolfson, Attorney

Counsel for Petitioners

A F F I D A V I T

I the undersigned, Ariana Baruch, after being warned that I must tell the truth, and that I shall be subject to statutory punishment if I do not do so, hereby declare in writing as follows:

1. I make this affidavit in support of the petition in the matter of the failure to respond to requests of HaMoked: Center for the Defence of the Individual regarding visits to detention facilities.
2. I am the Client Advocacy Coordinator at HaMoked: Center for the Defence of the Individual.
3. The details set forth in the petition that relate to contacts and correspondence between HaMoked: Center for the Defence of the Individual and the authorities are true.
4. The details relating to the prisoner and his family, which appear in the petition and in the correspondence, are true to the best of my knowledge, in that they were obtained from the family by the skilled staff of HaMoked: Center for the Defence of the Individual.
5. I declare that this is my name, this is my signature, and the contents of this affidavit are true.

[signed]

Signature of the Declarant

I hereby certify that on 26 August 2004, the aforesaid, with whom I am personally acquainted, appeared before me, Attorney Yossi Wolfson, at the office of HaMoked: Center for the Defence of the Individual, at 4 Abu Obeidah Street, Jerusalem, and after I warned her that she must tell the truth and that she is subject to statutory punishment if she does not do so, she confirmed the accuracy of her said declaration and signed it.

[signed]

Yossi Wolfson, Attorney