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

H CJ 4416/05

In the matter of:

1. **A minor boy**
Venezuelan passport no. _____, by his father, Petitioner 2
2. _____ **Abu Shamma**
ID number _____, resident of Marda, Salfit District
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 Leena Abu-
Mukh Zuabi (Lic. No. 33775) and/or Shirin Batshon (Lic.
No. 32737) and/or Hava Matras-Ivron (Lic. No. 35174)
and/or Sigi Ben-Ari (Lic. No. 37566)
of HaMoked: Center for the Defence of the Individual
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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 and ordering him to appear and show cause:

- A. Why he does not grant Petitioner 1 a permit to enter the West Bank immediately, before he reaches 16 years of age, so that he can be registered in the Palestinian registry, which he is entitled to do pursuant to the blood-line law applying in the West Bank.
- B. Why he does not cease his sweeping refusal to permit the entry into the West Bank of children of Palestinians who are 5-16 years old, live abroad, and want to register for the first time in the Palestinian registry of residents.

Request for Urgent Hearing

Petitioner 1 (hereinafter: the Petitioner) is a child who was born on 1 July 1989, making him 15 years and ten months old. He was born in Venezuela and lives there with his family. He wishes to register in the Palestinian registry in the West Bank. **To exercise his right pursuant to the law applying in the Occupied Territories, and in accordance with the demand of the Respondent that he be physically present in the West Bank as a condition to being registered, *he must enter the West Bank before he turns 16, i.e., before 1 July 2005.***

The Respondent does not contest the right of the Petitioner to register in the registry, but refuses to give him a permit to enter the West Bank, thus impeding his rights. If not permitted to enter the West Bank, the Petitioner will suffer *irreparable injury*, for, after turning 16, he will no longer be allowed to register himself by virtue of the blood-line law, or pursuant to any other law, in that the Respondent does not permit belated registration, and does not permit family unification.

In effect, the Petitioner is liable to lose his Palestinian identity, and with it any chance to live in the West Bank when his family returns there. The Petitioner also would not be allowed to visit the West Bank.

For more than seven months, the Petitioners have warned the Respondent that the Petitioner's 16th birthday is approaching, and that the problem must be handled expeditiously. Time after time, the Respondent has said that the matter was still under review.

In light of the above, the Court is requested to set an urgent hearing date on the petition.

The Matter of the Petition in a Nutshell

According to the law applying in the Occupied Territories (in accordance with the Interim Agreement and the military orders applying it to the West Bank and the Gaza Strip), the Palestinian Authority is empowered to register every child born to a Palestinian father or mother who is registered in the registry, without requiring Israel's prior approval, provided that the child has not yet attained 16 years of age.

The Respondent recognizes this power, but requires that the children be physically present in the West Bank at the time of registration. This condition has no legal basis and has not in the past prevented the registration of children who spent their childhood outside the West Bank. These children would enter the West Bank by virtue of a visitor's permit and register in the registry.

Following the outbreak of the Intifada, the Respondent made a sweeping decision to prevent “foreigners” from entering the West Bank, including Palestinian children who live abroad and have not yet been recorded in the registry (except for children under five years old, who do not require a visitor’s permit). As a result, many children, such as the Petitioner, find themselves in a situation in which the years pass without their being able to be recorded in the registry.

This situation is completely wrongful. On the one hand, the Respondent requires that children be present in the West Bank if they want to register as Palestinians, and, on the other hand, refuses to issue them permits to enter the West Bank because they are “foreigners.” These children and their parents find themselves in an impossible situation, a “Catch 22.” Their rights are fake.

The Factual Basis

The parties

1. The Petitioner and Petitioner 2 (hereinafter: the father of the Petitioner) are Palestinians, son and father. The father of the Petitioner was born in the West Bank in 1967. In 1984, he traveled to Venezuela and lived there until 1988. That year, he returned to the West Bank and married Ms. _____ Al-Aqra', a resident of Venezuela. The couple lived for a time in the West Bank and then returned to Venezuela, where they had three children: _____ (the Petitioner); _____, who is 12 years old; and _____, who is nine years old. A copy of the marriage certificate of the Petitioner’s parents is attached hereto as P/1. A copy of the birth certificate from Venezuela is attached hereto as P/2.
2. Petitioner 3 (hereinafter: HaMoked: Center for the Defence of the Individual or HaMoked) is a non-profit association that acts to advance human rights in the Occupied Territories.
3. The Respondent holds, on behalf of the State of Israel, the West Bank in belligerent occupation. The Respondent holds supreme responsibility for proper living conditions in the West Bank, and retains for himself the power to grant permits to visit in the West Bank.

The Petitioner’s interest

4. The father of the Petitioner, as stated, has lived for some years in Venezuela. He visits the West Bank whenever he can. As a proud Palestinian, he considers it very important that his son be registered in the Palestinian registry as a resident of the Palestinian Authority.

5. The Petitioner visited the West Bank in 1998, when he was nine years old, together with his family. During that visit, which lasted one month, he was not registered in the registry. His parents thought there was no urgency in the matter of his registration. Nobody could have anticipated that the situation would change so drastically, and that Israel would place a comprehensive and prolonged freeze on granting permits to visit the West Bank.
6. In 2004, the father of the Petitioner realized that Israel's freeze policy was not about to change, and decided to try to register his son in the West Bank. He traveled to Jordan with the Petitioner, hoping and believing that the Israeli embassy in Amman would agree to grant the Petitioner a permit to enter the West Bank. His hope proved false. No permit was issued, and the father of the Petitioner had to leave the Petitioner with relatives in Jordan and enter the West Bank by himself.
7. While in the West Bank, the father of the Petitioner tried to register the Petitioner and his younger sisters, but the Palestinian Ministry of the Interior told him in no uncertain terms that the Israeli officials require that the Petitioner be physically present in the West Bank, and, lacking that, the registration would be meaningless. In distress, he turned to HaMoked: Center for the Defence of the Individual for help.

The Petitioners' requests to the Respondent

8. On 4 October 2004, the Petitioners wrote to the Respondent, requesting that he permit the Petitioner to enter the West Bank so as not to lose his right to be registered in the registry by virtue of the blood-line law. The Respondent was informed of the urgency of the request, and that the Petitioner would soon turn 16.

A copy of the letter of 4 October 2004 is attached hereto as P/3.
9. It should be mentioned that HaMoked recently handled other complaints concerning the same subject – the entry of Palestinian children living abroad to the West Bank for purposes of registration in the registry.

Copies of the letters involving three other children are attached hereto as P/4 – P/6.
10. On 3 November 2004, a reminder was sent.

A copy of the letter of 3 November 2004 is attached hereto as P/7.
11. On 24 November 2004, Captain Kotlik responded, on behalf of the Respondent's legal advisor, to the letter of HaMoked. Captain Kotlik contended that he did not receive the

first letter that HaMoked sent. It should be noted that receipt of the letter by the office of the Respondent's legal advisor was confirmed by telephone by the legal advisor's office. In any event, the letter was resent, with a reminder.

A copy of the letter of 24 November 2004 is attached hereto as P/8.

The reminder is attached hereto as P/9.

12. Also, Captain Kotlik stated [in his letter]:

In your above-referenced letter, the fundamental problem was raised regarding the granting of permits to enter Judea and Samaria to children aged 6-16 of residents of the Region, when the children are not registered as residents of the Region. Various IDF officials are now working on finding a solution for the problem that you described in your above-referenced letter. Until such time as an overall solution is found for the problem you described, the undersigned is taking action to arrange the matter as regards the particular children mentioned in your request. However, we wish to point out that it may take some time before an overall solution is found.

Encouraged by this response, the Petitioners waited patiently, but no progress was made. On the other hand, time continued to tick away.

13. On 3 February 2005, another reminder was sent to the Respondent's legal advisor's office, pointing out once again the urgency of the matter.

A copy of the letter of 3 February 2005 is attached hereto as P/10.

14. On 13 February 2005, a letter was sent to Captain Yig'al Ostonovsky, of the Civil Law Division, in the International Law Department. On 14 February 2005, Captain Ostonovsky acknowledged receipt of the letter and wrote that the request had been forwarded to the Respondent's legal advisor for handling.

A copy of the letter of 13 February 2005 and the response of 14 February 2005 are attached hereto as P/11 and Appendix P/12, respectively.

15. On 22 February 2005, verbal approval was given in principle for a visitor's permit to be issued to three of the children on behalf of whom HaMoked made the request, but the

request on behalf of the Petitioner, possibly the most urgent of the lot, was not approved. Subsequently, written approval was sent relating to two of the requests (see P/4 and P/5).

Copies of the Respondent's responses regarding two other children are attached hereto as P/13 and P/14.

16. On 14 March 2005, another and last reminder was sent.

A copy of the letter of 14 March 2005 is attached hereto as P/15.

17. Thus, *seven months* passed and no solution had been reached. The clock is running, but the Respondent procrastinates and does not leave the Petitioners any option but to file this petition. Furthermore, although the assistant to the Respondent's legal advisor told HaMoked's representative that they would handle the request even if the Petitioner turns 16, because of his request filed earlier, she did not consent to make the commitment in writing.

The Legal Argument

18. **The issue herein raises a “fundamental problem” according to the Respondent, but its solution is very simple. The only thing the Respondent has to do is exercise – reasonably, in accordance with the obligations of an occupying power, and in a manner that does not impede the Petitioner's rights and the rights of other Palestinians – the discretion that he took regarding the granting of permits to visit in the West Bank.**

19. **The Respondent faces no legal difficulty in granting the visitor's permits. Nor is there any security problem in granting the visitor's permits, as they are being issued to children.**

Registering the children in the registry

20. The power to register children was applied to the West Bank by Minshar Zeva'i [military proclamation] (No. 7), which implemented the Interim Agreement between Israel and the Palestinian Authority [sic]. The agreement transferred exclusive responsibility for registering children under the age of 16 to the Palestinians, whether the child was born abroad or in the Occupied Territories, without Israel's prior approval being required. Article 28(12) of the third annex of the Interim Agreement states:

The Palestinian side shall have the right to register in the population registry all persons who were born abroad or in the

Gaza Strip and West Bank, if under the age of sixteen years and either of their parents is a resident of the Gaza Strip and West Bank.

21. After age 16, Article 28(11) applies. This article enables the Palestinian Authority to register and grant a permanent status to the children of residents in the framework of family unification (or “belated registration”), provided that the prior approval of the Israeli side is provided. The Israel side unilaterally and severely restricted this possibility even before the outbreak of the Intifada, and in recent years, the process has been frozen altogether on the grounds that there is no contact between the sides.
- For further discussion on this point, see the report by B'Tselem and HaMoked: Center for the Defence of the Individual, *Families Torn Apart*, pp. 103-110 http://hamoked.org.il/items/10700_eng.pdf.
22. The Interim Agreement did not establish the registration rules; in any case, when exclusive power was handed over to the Palestinian Authority, it was anticipated that it would set the registration rules. However, controlling the computerized registry, and by exploiting the fact that documentation that is not acknowledged by Israel is worthless, Israel continued, in practice, to control the registry and compel the Palestinian side to apply the said condition, whereby Israel will only respect requests to register children when the applicant is physically present in the West Bank.
23. It should be noted that, contrary to the power to grant a status to foreigners inside Israel, a power with broad discretion, regarding the registration of children of Palestinians in the Occupied Territories, Israel, as the occupying power, has no power or discretion over the very act of registration and must refrain from taking any action that will obstruct the act of registration.

Freeze on the granting of permits to visit in the West Bank

24. The Respondent also maintains control over the granting of permits to visit in the West Bank, both by virtue of his declaring the area of the West Bank a closed military area and by virtue of the Interim Agreement. However, for almost four and a half years, the Respondent has completely frozen all procedures for issuing permits to visit in the Occupied Territories. Such a prolonged and comprehensive freeze flagrantly breaches his obligations set forth in international law, as well as under treaty-based law in the West Bank.

25. On 21 February 2005, HaMoked requested that the granting of visitor's permits be re-instituted. Its letter stated, *inter alia*:

An administrative authority is not permitted to disclaim its powers and refrain from exercising them. Just as a local authority is not allowed to close schools because of a dispute with the central government, one administrative authority (in this case, the Israel military administration) cannot disclaim its powers because of a dispute with another administrative authority (agencies of the Palestinian Authority). An administrative authority is not permitted to "strike," neither against the population nor against another authority with which it shares power.

...

The continuation of the freeze policy exacerbates the dangerous consequences and increases the illegality of the action. Closing the border for several days during combat actions is not the same as closing it for months and years. Quantity becomes quality. Short separations turn into a reality of family destruction. The lessening of social contact between relatives brings about detachment and strangeness between them. Temporary suffering of children becomes a life of deprivation with hard long-term consequences. The humanitarian distress increases and worsens.

A copy of the letter of 21 February 2005 is attached hereto as P/16.

26. One of the harsh phenomena of the Respondent's freeze is, as stated, the impossibility of children such as the Petitioner to enter the West Bank to register in the population registry. It is also clear that, as the freeze continues, more and more children will find themselves unable to be registered and to visit in the West Bank.
27. This way or that, even before the Respondent ends the freeze, nothing prohibits the granting of visitor's permits in specific cases, in that a policy is involved, and not a statute, law, or regulation that prevents it. Even the Respondent himself is of the opinion that the freeze policy was taken subject to specific exceptional cases.

Infringement of the right to nationality, identity, and group membership, and to the rights resulting therefrom

28. The child's request to be registered for the first time in the population registry as a member of the Palestinian people in the Occupied Territories is not solely a technical matter. First and foremost, it reflects a desire to obtain a nationality, an identity, and of belonging. It is a desire to be part of society, to be integrated in its ways and to influence its future. Nationality is a significant key to gain a feeling of identity and belonging, as well as to receive substantial and fundamental rights, such as the right to vote.

The right to nationality, though it is not yet enshrined in a Basic Law, is by its nature a fundamental right... Therefore, the right to nationality should be protected, so the Minister of the Interior does not prevent its attainment by a person entitled to it, and more importantly, that the minister does not unlawfully revoke it after it is given (HCJ 1227/98, *Malewsky v. Minister of the Interior*, *Piskei Din* 52 (4) 690, 698).

See, also, HCJ 2757/96, *Alra'i v. Minister of the Interior*, *Piskei Din* 50 (2) 18, 22.

29. The Petitioner wishes to obtain for himself official status as a Palestinian resident of the Occupied Territories, a status that now, even before the Palestinian Authority becomes a state, will entitle him to many rights: he will be able to vote in parliamentary and presidential elections, the day may come that he will be elected if he so desires, he will benefit from services that the Palestinian Authority provides to its residents. Also, the status will grant him freedom to enter and leave the Occupied Territories, and to remain there lawfully.

30. Also, international law is clear on the right of a child to nationality, identity, and belonging. Article 8 of the Convention on the Rights of the Child, of 1989, states:

- 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.**
- 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall**

provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Preventing the Petitioner from obtaining a nationality means a wrongful deportation

31. The Respondent's position impedes the right and ability of the Petitioner to obtain a permanent status in the Occupied Territories, to which he is entitled by law. In effect, the consequence of this policy is deportation. Just as the Respondent has no power to prevent the return of a resident of the Occupied Territories who has gone abroad, so, too, the Respondent does not have the power to prevent the entry of a child, a potential resident of the Occupied Territories, who has not yet registered. Both cases constitute deportation, even though they do not involve the active, physical, forced deportation of the person.
32. International law relating to occupied territory expressly prohibits deportation. Article 49 of the Fourth Geneva Convention states that this means is prohibited, whatever the motive.

Discrimination against the Petitioner

33. As stated, in two other cases, of young girls who were in the same position as the Petitioner, the Respondent agreed to issue them an entry permit for the purposes of registering in the registry. In that persons of these ages do not constitute a security problem, the failure to grant a similar entry permit to the Petitioner is discriminatory.

Disregard for the best interest of the child

34. The Respondent's decision harms the Petitioner and other children; as a result, the Respondent must give great consideration to their welfare. **The best interest of the child**, the principle that applies in every administrative decision affecting children, apparently was forgotten when the Respondent made his decision:

It is well-known that, in every matter involving a minor, the best interest of the minor is the primary consideration taken into account in deciding a matter involving the minor (CA 10280/01, *Dr. Yarus-Haqq v. The Attorney General*, judgment of 10 January 2005, Par. 14).

Extraneous considerations and forbidden objectives

35. The Respondent's decision raises the concern that he was motivated by extraneous and improper reasons that were unrelated to security, but involved demographics. By means

