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**In the Supreme Court**  
**Sitting as the High Court of Justice**

**HCJ 1034/04**

In the matter of:

- 1. Qotina**
- 2. A. G.**
- 3. HaMoked: Center for the Defence of the Individual, Founded by Lotte Salzberger**

by attorneys 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),  
of HaMoked: Center for the Defence of the Individual, Founded by Lotte Salzberger  
4 Abu Obeidah Street, Jerusalem  
Tel. 02-6283555 Fax. 02-627317

**The Petitioners**

v.

**Commander of IDF Forces in the Gaza Strip**

**The Respondent**

**Petition for Order Nisi**

A petition is hereby filed for an Order Nisi directing the Respondent to show cause (if he wishes to do so):

1. Why he does not allow Petitioners 1 and 2 (hereafter: “the Petitioners”) to enter the Gaza Strip to visit their ailing father, age 79, who became a widower two months ago and whose sister (the Petitioners’ aunt) passed away yesterday, why he does not allow the spouse of Petitioner 1 and their children to enter with them; and why he does not allow them to do so during the Holiday of the Sacrifice that is now beginning.
2. Why he does not allow Israelis to visit their relatives living in the territory of the Gaza Strip that are administered by the Palestinian Authority, absent a reason to deny entry that relates specifically to the individuals who are not permitted entry.
3. As an alternate relief to number 2 above: why he does not allow Israelis to visit their relatives living in the territory of the Gaza Strip that are administered by the Palestinian Authority, absent a reason to deny entry that relates specifically to the

individuals who are not permitted entry, during the Holiday of the Sacrifice that is now beginning.

**The grounds for the petition are as follows:**

1. Rabbi Tarfon had an elderly mother. Every time she wanted to get into bed, he leaned over and she got on him. He went to the Beit HaMidrash [study hall] and praised himself. They told him: you have not yet achieved half your filial duties. Did she throw a bag of money into the sea in your presence, and you did not reproach her? (Tractate *Qiddushin* 31b) This is the commandment to honor thy parents, and this the value it holds.

The Petitioners' father is elderly and is chronically ill. He lives in the Gaza Strip. The Respondent does not view his daughters' desire to visit him sufficient reason to allow them to enter the Gaza Strip, even at holiday time.

The relevant details are as follows:

2. The Petitioners were born and grew up in the Gaza Strip.

Petitioner 1, who was born in 1959, has been married to an Israeli resident since 1981, and was granted Israeli residency pursuant to the family unification process.

Petitioner 1 has three children and is employed by the Jerusalem Municipality as a teacher's aid.

Petitioner 2, who was born in 1953, is married to a resident of Nazareth, and has lived there since the couple married in 1977. She is a citizen of the state. Petitioner 2 has six children and is a homemaker.

3. The Petitioners' father, who is 79, continues to reside in the Gaza Strip. He suffers from heart problems, shortness of breath, and chest pains. As a result of a stroke, he has great difficulty in speaking.

A medical certificate regarding the Petitioners' father's health is attached as Appendix P/1.

On 1 February 2004, their father's sister, N. – the Petitioners' aunt – passed away.

4. Petitioner 3, HaMoked: Center for the Defence of the Individual, is a human rights non-profit society, situated in Jerusalem, that assists, *inter alia*, Israelis wanting to visit relatives in the Gaza Strip that are administered by the Palestinian Authority.
5. The Respondent holds the Gaza Strip by means of belligerent occupation, and bears the rights and obligations entailed in such situation. In 1994, the Respondent issued an order preventing Israelis from entering the sections of

the Gaza Strip that are administered by the Palestinian Authority. Over the years, the Respondent steadily intensified the prohibition on Israelis entering these areas, so that it an almost total prohibition now exists.

### **The previous visit and the death of the Petitioners' mother**

6. On 23 November 2003, HaMoked: Center for the Defence of the Individual submitted an urgent request to the Respondent, through the Gaza DCO [District Coordination Office], to allow the Petitioners to enter the Gaza Strip to visit their mother, who was then on her deathbed. Because of the Respondent's policy of almost total prohibition on Israelis entering the Gaza Strip, the Petitioners had not seen their mother since August 2000.

The urgent request of 23 November 2003 is attached as Appendix P/2.

7. The Respondent did not grant the request.
8. The Muslim holiday Id al-Fitr followed a few days later. For the first time since the beginning of the current intifada (except for visits that were allowed on the first day of the holiday in 2000), the Respondent allowed Israelis to enter the areas of the Gaza Strip under Palestinian control. The permission was limited to Israelis who had first-degree relatives in the Gaza Strip and to their nuclear family.
9. The Petitioners took advantage of the permission and entered the Gaza Strip. They managed to see their mother while she was still alive. A half hour after seeing her daughters, the mother passed away. The Petitioners attended the funeral. When the Respondent refused to extend their permits for more than the two days allowed for bereavement, they returned to Israel.

### **The present request**

10. On 25 January 2004, HaMoked: Center for the Defence of the Individual submitted, through the "Israelis Office", an urgent request to allow the Petitioners to enter the Gaza Strip on the Holiday of the Sacrifice so that they could visit their widowed, ailing father, and be with him during the holiday. The request also sought permission for Petitioner 1's spouse and children, and the daughter of Petitioner 2, to enter the Gaza Strip to visit the Petitioners' father.

The request of 25 January 2004 is attached as Appendix P/3.

11. On 1 February 2004, the "Israelis Office" stated the request would not be processed, even as an exception, because a comprehensive closure had been placed on the Gaza Strip following the terrorist attack that had taken place in Jerusalem, and that the request could only be processed after the holiday. Consistent with its normal practice, the "Israelis office" only gave a verbal response. The office later stated that the request

would be processed, but as of the second day of the holiday, no answer had yet been given.

12. On 1 February 2004, the Petitioners received the sad news that their aunt had died.

**Requests submitted by HaMoked: Center for the Defence of the Individual regarding holiday visits**

13. On 22 January 2004, HaMoked: Center for the Defence of the Individual wrote to the Respondent, through his deputy legal advisor, requesting that he allow Israeli residents to visit during the Holiday of the Sacrifice their relatives living in areas in the Gaza Strip that are administered by the Palestinian Authority.

Copies of the request were sent to the Coordinator of Government Operations in the Territories, to the International Law Department of the Judge Advocate General's Office, and to the High Court of Justice Department of the State Attorney's Office.

The request of 22 January 2004 is attached hereto as Appendix P/4.

14. Last week, HaMoked: Center for the Defence of the Individual was informed that criteria had been formulated that would enable Israelis to visit their relatives in the Gaza Strip during the holiday. Ultimately, HaMoked: Center for the Defence of the Individual was also informed that the Minister of Defense had approved the said visits.

15. On 27 January 2004, HaMoked: Center for the Defence of the Individual wrote to the Respondent, through his legal advisor, requesting that the criteria be more liberal or (at least) that he consider on an individual basis requests made by persons who do not meet the criteria.

The request of 27 January 2004 is attached as Appendix P/5.

16. On 29 January 2004, a terrorist attack was perpetrated in Jerusalem. According to media reports, the attack was executed by a resident of the Bethlehem district in the Occupied Territories.

17. On 1 February 2004, HaMoked: Center for the Defence of the Individual learned that the Respondent no longer intended to allow holiday visits in the Gaza Strip. The reason: the bombing attack in Jerusalem. The undersigned was also informed that the change was a "political decision" made by the Minister of Defense.

18. Yesterday, hundreds of Israelis whose relatives live in the Gaza Strip arrived at the Erez checkpoint with the hope of meeting their relatives in the Strip. The Respondent did not allow them to enter.

19. Throughout the day, 1 February 2004, HaMoked: Center for the Defence of the Individual remained in contact with the relevant officials. Its efforts failed.

Attached to the petition are the following:

The letter of the undersigned of 1 February 2004 to the High Court of Justice Department of the State Attorney's Office (with a copy to the Respondent's legal advisor) – is marked Appendix P/6.

The letter of the undersigned of 1 February 2004 to the Coordinator of Government Activities in the Territories (with a copy to the International Law Department of the Judge Advocate General's Office – is marked Appendix P/7.

The letter of the undersigned of 1 February 2004 to the Minister of Defense (with a copy to his assistant and to the High Court of Justice Department of the State Attorney's Office) – is marked Appendix P/8.

20. At 3:00 P.M. on 1 February, the undersigned informed the High Court of Justice Department of the State Attorney's Office that he intended to petition the High Court in the matter.
21. Later in the afternoon, Petitioners' counsel was informed that the Minister of Defense changed his decision following the intervention of MK Gal'on. In practice, however, nothing changed. One of the officials with whom the undersigned was in contact knew nothing about any such change in the decision.

**The Respondent's policy on allowing Israelis to enter territories administered by the Palestinian Authority**

22. As stated above, the Respondent prevents Israelis from entering the areas of the Gaza Strip that are under Palestinian control, and his current policy is to prevent any such visit, except in isolated cases that are classified as "cases of an extreme humanitarian nature." At the end of November 2003, after three years in which the Respondent did not allow holiday visits in the Gaza Strip, he allowed Israelis to visit their relatives in the Gaza Strip for the Id al-Fitr holiday.
23. Based on the experience of HaMoked: Center for the Defence of the Individual, the Respondent only approves requests of spouses and children of residents of the Gaza Strip who wish to visit the spouse living in the Strip, or who live with the spouse there. The requests of other relatives are approved only when a relative of the *first degree* is in grave medical condition, confirmed by an up-to-date medical document, or to attend the funeral of a relative of the first degree. In these situations, too, entry is generally not allowed for relatives of the second degree (such as a grandchild of the ailing resident or the wife of a first-degree relative who is allowed to attend the funeral). In rare cases, HaMoked: Center for the Defence of the Individual succeeded in arranging the entry of relatives to attend other special family events.

24. To illustrate the situation, attached hereto is correspondence between HaMoked: Center for the Defence of the Individual and the State Attorney's Office regarding two families that wished to enter the Gaza Strip to attend a wedding in the family.
25. The first letter involves the A.S. family, who live in Jerusalem. They wanted to enter Gaza to take part in the wedding of the mother's nephew. The mother was born in Gaza and obtained Jerusalem-residency status following the family unification process. In his letter, the undersigned stated:

**For a long time, the Erez DCO [District Coordination Office] has applied stringent and vague criteria in examining requests submitted by Israeli civilians and residents to enter the Gaza Strip. These criteria are set by soldiers at the DCO so as to enable entry only in "the most extreme humanitarian cases"... At times, only the angel of death holds the key to enter the Strip (provided that the deceased is a relative of the first degree)...**

**Respect for the family and cultural and religious custom – a duty of the authorities and the commander in the field – does not end in making it possible for contact between a man and wife (which is also prevented at times). It requires enabling the person to be present at family celebrations, and refraining from tearing the fabric of life as reflected in ties between grandfather and grandchild, uncles and aunts with their nieces and nephews, between cousins, in-laws, brothers, sisters... It goes without saying that the geopolitical situation and the many consecutive years of freedom of movement between the Strip and Israel developed and strengthened this fabric of life, as in the case of our client, who was born in the Strip and was married inside Israel...**

A copy of the letter, dated 2 October 2003, is attached as Appendix P/9.

The letter received no substantive response. The wedding took place, but the family did not attend.

26. In the second letter sent by the undersigned, Petitioners' counsel reiterated to the High Court of Justice Department of the State Prosecutor's Office the problem of the stringent, restrictive procedures instituted by the Respondent regarding Israelis wishing to visit their relatives in Gaza. Petitioners' counsel wrote about another

family, which also sought to enter the Gaza Strip to attend a wedding celebration. In this case, the person seeking entry was a resident of the West Bank who held temporary-resident status in Israel resulting from his participation in the family unification process.

A copy of the letter, dated 15 October 2003, is attached as Appendix P/10.

27. In this case, the State Attorney's Office and the International Law Department in the Judge Advocate General's Office intervened. An exception was made, and the applicant was allowed to enter the Gaza Strip. The exception was made because the applicant was a resident of the Strip, in addition to being a temporary resident of Israel. In making another exception in this case, the authorities allowed the applicant's wife to accompany him because he was disabled and bound to his wheelchair, requiring constant aid. The couple's children (the minors) were not allowed to enter.
28. The limited approval given only in exception cases illustrates the narrow opening that the Respondent offers for Israelis wanting to enter areas of the Gaza Strip that are under the control of the Palestinian Authority. The handling of this case once again demonstrates the defects in the Respondent's policy. Following the case, the undersigned wrote to the head of the High Court of Justice Department in the State Attorney's Office:

**From a conversation that I had in the Tureq matter with a soldier in the International Law Department in the Judge Advocate General's Office, I learned that the refusal to let my client enter was because he did not meet the "criteria." The "criteria" have never been published, and will not be provided to me. Certain people know about them, but nobody can tell me who these people are. The decision-makers know them.**

**Where a person does not meet the criteria, the individual particulars of his case are not examined (as regards the danger to his welfare if he enters, or the security risk entailed in his entering); thus, for example, no examination was made of the particulars in my client's case until after the preliminary petition to the High Court of Justice had been submitted.**

**The general policy is that entry into Gaza is dangerous for Israelis. He could not tell me, though, the factual basis underlying this contention. I asked if he knew of one case in**

**which an Arab Israeli had been injured in Gaza because he was an Israeli. He could not enlighten me – possibly you can. In any event, it is clear that an Israeli who enters Gush Qatif in the Strip (for example) faces far greater danger because he is an Israeli – but the authorities do not prevent him from entering.**

A copy of the letter, dated 23 October 2003, is attached as Appendix P/11.

29. The subject of the Respondent's policy regarding the entry of Israelis into the Gaza Strip to visit relatives is pending in this Honorable Court in H CJ 10043/03, *Abajian et al. v. Commander of IDF Forces in the Gaza Strip*. The petition was filed following the Respondent's refusal to allow that petitioner to visit his elderly and ailing mother in the Gaza Strip. Following the filing of the petition, the Respondent allowed the petitioner to make the visit, but did not change his policy.

**30. Last November, the Respondent allowed Israelis to enter the Gaza Strip to celebrate the Muslim holiday Id al-Fitr. Entry was allowed for Israelis – together with their spouses and children – to visit relatives of the first degree (parents, siblings, and children) in the Gaza Strip.**

**In these visits, some 5,000 Israelis entered the Gaza Strip, without any harm resulting to them or to state security.**

### **The legal argument**

#### **The lack of purpose, unacceptable paternalism, and absence of factual foundation**

31. The Respondent contends that the refusal to allow Israelis to enter areas of the Palestinian Authority results from his concern that the Palestinians might harm them. This is the position taken by the Respondent in H CJ 9293/01, *Barakeh et al. v. Minister of Defense et al. (Piskei Din 56 (2) 509)*. In that matter, the court held that the danger to the petitioners not only was of a personal nature (that restrictions on their movement would of itself constitute a paternalistic act):

**If any of the petitioners – who are Members of Knesset – will be harmed, the state is liable to suffer great damage. Thus, not only [is there concern about the] harm that the petitioners will suffer themselves – which may be substantial and severe – but there is also the [concern for] state security itself. In this sense, the consent of the petitions to take the risk is inconsequential one way or the other. (p. 515)**

A major consideration that led to the conclusion that there was reason to worry that the petitioners would be harmed was that they were Members of Knesset:

**The very fact that the petitioners are Members of Knesset is the basis of the security danger entailed in their entering territory of the Palestinian Authority.** (p. 516)

The Court also mentioned that the authorities had *information on the intention to harm Israeli public officials*.

32. The Petitioners case is different. The Petitioners are Palestinians who were born in Gaza, lived in Gaza for many years, and have relatives and acquaintances in the Gaza Strip. They hold no official position in the Israeli administration, and are not a likely target of action aimed at Israel. In that a hypothetical attack on them would have no effect on state security itself, it is wrong to treat them paternalistically by protecting them against their will.
33. This is also true as regards other Israelis who have relatives in the Gaza Strip. The Petitioners are not aware of any case in which an Israeli of Arab Palestinian nationality who entered the Gaza Strip to visit family was attacked because he held an Israeli identity card. Nor has the Respondent offered even one example of such a case. The information mentioned in H CJ 9232/01, cited above, related only to harm to Israeli public officials, and not to ordinary citizens.
34. If the Respondent has any worry about the danger facing the Petitioners, or other relatives of Palestinian residing in the Strip, in the event that they enter the Gaza Strip, the fear is purely speculative and unrealistic and is based on a completely paternalistic attitude.

The family visits to the Gaza Strip that thousands of Israelis made only some two months ago also rebut the fear expressed by the Respondent. As far as HaMoked: Center for the Defence of the Individual knows, not only was there no large-scale massacre of the visitors, but not even one of them received a scratch.

On the other hand, though, it is certain that the fundamental rights of the Petitioners and persons in their situation will be infringed.

Despite this, the Respondent chooses to violate the Petitioners' rights in an action that, on the face of it, is not only excessive, but lacks any purpose whatsoever.

#### **Extraneous considerations and collective punishment**

35. The Respondent changed his mind and did not allow family visits in the Gaza Strip. His refusal was based on an order – in what was described as a “**political decision**” – that the Minister of Defense gave him.

The background of the decision: the attack in Jerusalem carried out by a resident of the Occupied Territories from the Bethlehem district. There is no connection whatsoever between that attack and Israelis visiting in the Gaza Strip.

The attack is irrelevant to the subject, and certainly cannot form a basis for changing the prior decision to allow visits. This was an extraneous consideration.

36. Not only was it an extraneous consideration, it was also improper. It is even hard to include the Respondent's decision within the rubric of "collective punishment." In the case of "collective punishment," it is assumed that the punishment is imposed on those who are to blame *and also* on a wider circle of innocent persons.

In this instance, we have a vengeful and improper measure that possibly reflects an emotional need to express rage at the murderous bombing attack – but at the same time inflicts purposeless injury to citizens and residents of the state who had no connection to the bombing.

37. As regards the Respondent's general policy, the Petitioners doubt that paternalistic motives form the basis of the Respondent's policy. The fear is that the policy is based on extraneous motives, such as a political agenda aimed at dividing the Palestinian people into isolated social groups, each restricted to a narrow territory, or possibly collective punishment of residents of the Gaza Strip by isolating them and blocking their ties with their relatives in Israel.

38. These possibilities enable one to understand the ostensible outrageous discrimination between the policy related to entry of Israelis into areas in the Gaza Strip that are administered by the Palestinian Authority and entry of Israelis to settlements in the Gaza Strip. Clearly, Israelis entering the settlements are exposed to much greater danger than are Palestinian citizens or residents of Israeli who visit their relatives in Gaza. The dangers faced by Israelis entering the settlements are, sadly, frequently in the news. Nevertheless, the Respondent did not restrict whatsoever any Israeli from entering the settlements.

39. However, for the purpose of this petition, and as regards the Respondent's general policy, we shall consider the Respondent's actions based on his perspective, and examine his decision in light of the (unsustainable) reasons that he gave for his policy.

#### **Security reasons?**

40. The Petitioners do not question the authority of the Respondent to refuse a request if there are security reasons that dictate such action, as is the case if he has information that the visit will be used to aid terrorist activity that will result in the loss of innocent lives. For example, an Israeli was not allowed to enter the areas administered by the

Palestinian Authority in H CJ 10089/02, *Altiyeb et al. v. Commander of IDF Forces in the Gaza Strip* (unpublished). In its decision, the court illustrates the manner in which the Respondent must make decisions on refusing entry into the Gaza Strip. The court studied, *ex parte*, classified security material offered by the state and found that “refusal is proper where it is based on the *evidentiary material*.” The evidentiary material was concrete evidence that related to the husband of the said petitioner, on which the court found a “connection – an extremely strong connection – to serious terrorist acts against the State of Israel on behalf of the Popular Resistance Committee in Gaza. The refusal was based on considerations relating to a particular individual.

41. In our case, there is no reason to fear that the Petitioners will use their visit to their ailing father in Gaza to endanger state security. Such a claim is not even made.
42. The same is true about the visits of other persons. The Respondent, as we have seen, rejects their requests – because “they do not meet the criteria” – without making any security check, neither as regards the danger that they present nor as regards the danger to which they are purportedly exposed.

**The policy is indiscriminate and arbitrary**

43. As we have seen, the refusal to approve the Petitioners’ request did not follow a review of the specific particulars of the request, but was denied in accordance with a blanket policy, which itself was based on a questionable foundation.
44. A sweeping refusal to consider requests, regardless of the specific circumstances, is improper. The rule that requires consideration of the specific facts of the case and disallows blanket prohibitions has been stated in another context –

**The decision made by the Broadcasting Authority in this matter cannot be sweeping and general, but must be grounded in the circumstances of each and every case.** (H CJ 399/85, *Kahane et al. v. Broadcasting Authority Executive Committee et al.*, *Piskei Din* 41 (3) 255, 303)

See, also, H CJ 243/82, *Zikhroni v. Broadcasting Authority Executive Committee et al.*, *Piskei Din* 37 (1) 757, 782; Reh. H CJ 4191/97, *Rakanat Ephraim v. National Labor Court*, *Takdin Elyon* 2000 (4) 587, 594; H CJ 6741/99, *Yekutieli v. Minister of the Interior*, *Piskei Din* 55 (3) 673, 713-714.HC

45. The infringement of the Petitioners’ individual rights and of the rights of other persons in their situation, without any purpose, and based on a sweeping policy, contravenes a basic principle of our legal system, whereby protected human rights may only be infringed for a proper purpose and to the extent that is no greater than necessary.

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

Jerusalem, 2 February 2004

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[signed]  
Yossi Wolfson, Attorney  
Counsel for Petitioners