

[Unofficial Translation]

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

HCJ 5182/07

Concerning:

Sha'wan Rateb Abdullah Jabarin, ID 959106139

Through his representatives Adv. Michael Sfard and/or Shlomi Zecharia and/or Natalie Rosen of Sderot Rothschild 31, Tel-Aviv 66883, Tel. 03-5607345, Fax 03-5607346

The Petitioner

– Versus –

The Commander of IDF forces in the West Bank

Represented by the Office of the State Attorney, the Ministry of Justice, Salah-a-Din St., Jerusalem.

The Respondent

Petition for the Issue of a Conditional Order

Presented hereby is a petition for a conditional order, whereby the Honourable Court is moved to order the respondent to explain the following:

1. Why he should not remove the prohibition that he imposed on the petitioner to leave the West Bank to travel abroad;
2. Why he should not allow the petitioner to leave the West Bank in order to participate in an international conference on peace and justice that will take place in Germany from 25 to 27 June 2007

Request for an urgent hearing

The matter of this petition is the decision of the respondent not to allow the petitioner, who is the director of a well-known human rights organisation based in the city of Ramallah in the West Bank, to leave the West Bank to travel abroad.

The petitioner is supposed to arrive at a conference in Germany that will start on 25 June 2007.

In view of this tight schedule, the Honourable Court is requested to instruct the State Attorney to schedule this case for a hearing as soon as possible, bearing in mind that the petitioner needs time to organise his trip, purchase flight tickets and apply for a visa.

1. Introduction

- 1- The matter of this petition is the refusal of the respondent to allow the petitioner to leave the West Bank and travel abroad for the past year and four months.
- 2- As will be detailed below, the petitioner is a veteran human rights activist in the West Bank and restricting his movements amounts to harassing a man who works for the promotion of his people's human rights. The respondent prevents the petitioner from leaving the West Bank for work purposes, notably to attend conferences, lectures and working meetings in European cities, at the invitation of legitimate and well-known foreign and international human rights organisations.

- 3- The respondent's behaviour raises grave concerns both at the legal level – due to the fact that the petitioner is not prevented from leaving the country by an administrative or other order, which would give the petitioner the right to a hearing and appeal, but by physical means at the time of crossing the border – and at the public level, since the respondent's insistence to “ground” the petitioner in the West Bank damages the image and status of Israel.
- 4- In this petition, it will be argued that the respondent has violated the rights of the petitioner, both with regard to his personal freedom of movement and his rights as a defender of human rights and representative of civil society, who enjoys special and enhanced protections under the law. It will also be argued that the respondent did not take all the required issues into consideration and did not strike the proper balance between them.
- 5- For all these reasons, the petitioner will ask for the Court's intervention against the respondent, as mentioned in the opening of this petition.

2. Factual Background

- 6- The petitioner is a Palestinian civilian, resident of the village of Sa'ir in the West Bank, 47 years old, married and a father of four. The petitioner is a veteran human rights activist who has received prizes for his activities. At the beginning of 2006, he was appointed to act as the director of the Palestinian human rights organisation “Al Haq” and holds this position to this day.
- 7- “Al Haq”, which is based in Ramallah, is the oldest Palestinian human rights organisation active today in the West Bank. Since its establishment in 1979, the organisation participated in struggles to promote the human rights of Palestinians in the occupied territories by conducting research, providing legal aid and documenting individual and collective violations of human rights.
- 8- The organisation is a recognised human rights organisation that has been cooperating for years with known and recognised foreign, international and Israeli organisations.
- 9- The respondent is the military commander of the IDF forces in the West Bank. He is responsible for restoring and maintaining public order and civil life in the occupied territories, as well as ensuring the safety and security of civilians in the occupied territory.

10- Due to his position as the director of “Al Haq” and as a veteran human rights activist, the petitioner is invited from time to time to participate in international conferences, working meetings and lectures abroad.

11- In 2004, before being appointed to his present position, the petitioner requested to leave the West Bank to study for a Master's degree in Ireland, but his request was denied. Following this refusal, the petitioner appealed to this Honourable Court. During the proceedings (HCJ 7168, Sha'wan Rateb Abdullah Jabareen, vs. The commander of IDF forces in the West Bank), the respondent examined the matter of the petitioner again and decided to allow him to leave the country. Therefore, both parties agreed to strike the case off the list.

A copy of the agreed request to strike the case off the list in the abovementioned HCJ 7169/04 is attached to the petition under Appendix 1.

A copy of the judgment in HCJ 7169/04 is attached to this petition under Appendix 2.

In total, the petitioner left the West Bank to travel abroad on eight different occasions between 1999 and 2006, the last time being in February 2006. It should be noted that on some occasions, the petitioner was required to sign a commitment form whereby he promised not to undertake “terrorist activity” during his stay abroad.

A copy of the letter on behalf of the Attorney General of the West Bank allowing the petitioner's travel abroad in February 2006 on condition of his signing the said commitment form is attached to this petition under Appendix 3.

A copy of a letter on behalf of the Attorney General of the West Bank following the signing of the commitment form and allowing the petitioner's leaving for abroad in February 2006, is attached to this petition under Appendix 4.

12- Let it be noted that it is entirely unclear what legal basis there is for the request to sign the said form as a condition for leaving abroad. Despite this, the petitioner agreed to sign it and left for abroad.

13- Only since March 2006, has the respondent systematically prevented the petitioner from leaving for abroad and effectively “grounded” him in the West Bank – without an administrative order being issued against him and without any legal procedure being undertaken.

14- The petitioner arrived on 23 March 2006 at Allenby Bridge in order to exit to Jordan, but was returned from the Jordanian side of the border. The Israeli security officials presented

him with a police order instructing him to meet with the Shin Bet representative responsible for his area of residence in Kfar Etzion. The petitioner acted accordingly and arrived at the District Coordination Office (DCO) three days later, on 26 March 2006

15- When the petitioner came to the gates of the DCO in Etzion he was required to wait outside the facility for four hours before being told to enter. As he entered, his ID card was taken from him and he was requested to remove the clothes on his upper body. The petitioner refused to comply with this request, which he regarded as humiliating. As a result, the soldier who carried out the inspection sent him home, refusing to return his ID. The soldier maintained his refusal despite the petitioner's pleas that without it he couldn't legally move within the West Bank. Following this event, "Al Haq" submitted a complaint to the Attorney General of the West Bank.

A copy of the complaint is attached under Appendix 5.

16- The petitioner's ID was returned to him only three months later following the intervention of Adv. Yossi Wolfson of the organisation Hamoked – Centre for the Defence of the Individual.

A copy of the letter from Adv. Wolfson to the Attorney General of the West Bank and the response letter on behalf of the Attorney General of the West Bank are attached under Appendix 6.

17- Following this event, on 4 October 2006, the petitioner submitted a request to the Attorney General of the West Bank to allow him to attend a conference in Spain. His request was denied based on claims that he is an activist in the PFLP and that his exit to Jordan might therefore threaten the security of the area.

A copy of the letter of Private Tamar Laquoir in the name of the Attorney General of the West Bank is attached to the petition under Appendix 7.

18- In November 2006 the petitioner was invited to participate in a conference organised by Christian Aid in Egypt. This is an American Christian organisation that supports human rights activities all over the world.

The petitioner submitted a petition to this Honourable Court requesting that the Court instruct the respondent to allow the petitioner's travel to the said conference (HCJ 9703/06 Sha'wan Jabareen vs. The commander of IDF forces in the West Bank)

A copy of the petition in HCJ 9703/06 is attached to the present petition under Appendix 8.

19- After a hearing, part of which took place in the presence of only one party and in which the judges of the Honourable Court were presented with classified material, the petitioners' petition was rejected.

A copy of the judgment in HCJ 9703/06 is attached to the petition under Appendix 9.

20- The continued restriction on the petitioner's travels abroad, which damaged and continues to damage the functioning of the organisation he heads, has raised a wave of protest from international human rights organisations. On 11 March 2007, the international human rights organisation "Human Rights Watch" sent a letter to the Prime Minister of Israel, Mr. Ehud Olmert, in which it complained about the restrictions on the petitioner's movements and demanded their removal.

A copy of the letter of Sarah Leah Watson, the director of the Middle East and North America department of Human Rights Watch, of 11 March 2007 is attached to the petition under Appendix 10.

21- In addition, three international human rights organisations have made a joint statement protesting the continued restrictions on the freedom of movement of the petitioner, which prevent him, as a representative of the organisation he heads, from travelling abroad for professional purposes and accepting invitations from non-governmental organisations around the world.

A copy of the joint statement published by the organisations Human Rights Watch, Organisation Mondiale Contre la Torture (OMCT) and Federation International des Droits de l'Homme (FIDH) on 2 May 2007 is attached to the petition under Appendix 11.

22- On 1 May 2007, the petitioner – this time through his undersigned attorney – again approached the Attorney General of the West Bank requesting permission to leave the country to participate in an international conference on peace that is to take place in Nuremberg, Germany from 25 to 27 June 2007.

23- Since no answer was received, the undersigned approached the office of the Attorney General of the West Bank once again, on 9 May 2007, requesting him to hasten the processing of the petitioner's request. In this second approach, the undersigned mentioned that in the meantime the petitioner has also been invited to a series of working meetings in Geneva in the middle of May, and that a swift response was required for this reason as well.

Copies of the letters of the petitioner's attorney to the office of the Attorney General of the West Bank are attached to the petition under Appendix 12-13.

24- On 9 May 2007, an interim response was received from the representative of the Attorney General of the West Bank, which stated that "your current request has been passed on for re-examination. When this examination is concluded we will notify you of its results".

A copy of the response of the representative of the Attorney General of the West Bank is attached to the petition under Appendix 14.

25- Time passed and no final answer was received. The petitioner had to miss the working meetings in Geneva and up until the submission of this petition no final answer has been received from the office of the Attorney General of the West Bank, although the date of the conference to which he was invited in Germany is approaching. Given the pressing nature of the matter, the petitioner was forced to submit this petition and make a request for an urgent intervention from the Honourable Court.

3. The Legal Argument

A. The violation of the principle of legality and the natural rules of justice

26- There is a fundamental distinction between a private individual and an authority: every person has the freedom to do as his heart desires unless such action is forbidden by law, whereas an authority is prevented from taking any action that has not specifically been authorised by law, especially if this involves violating fundamental rights.

27- The law in force in the West Bank authorises the respondent to restrict the movement of a person, but this should be done through an administrative order and should follow the procedure described in it. We refer to Chapter 5 of the Order Concerning Security Decrees (Judea and Samaria) (order number 378), which deals with restriction and supervision orders.

28- Thus, for example, Article 86(b)(2) determines that the respondent is allowed to issue a special supervision order under which a person shall be subject to the following restriction:

"He will not leave the city, village or zone in which he lives, without the written permission of a military commander"

29- It is clear that this special supervision order also enables a military commander to prevent travel outside the occupied territory.

- 30- The Order Concerning Security Decrees authorises the respondent to restrict the movements of a person, but also determines that a restriction order or supervision order shall be issued only if the military commander “believes that it is necessary for decidedly security reasons” (Article 84(a) of the Order Concerning Security Decrees). The Order Concerning Security Decrees even establishes a procedure, including an appeals committee, which must hear the arguments of the person against whom the order is issued. Only a restriction order or supervision order that has been endorsed by an appeal committee that has guaranteed the right to a hearing may be deemed to comply with the principle of legality.
- 31- In our case the military commander, who is the respondent, chose not to use his authority under the Order Concerning Security Decrees, but rather to **physically obstruct** the petitioner’s crossing of the borders of the West Bank.
- 32- This violates the principle of legality and the rights of the petitioner who cannot take advantage of the few protections afforded to him in the Order Concerning Security Decrees (hearing, appeal procedures, and the proportionality of the restriction).
- 33- The circumvention of the authority granted to the respondent in the Order Concerning Security Decrees, if it was to be considered legal, would create an absurd situation in which the physical restriction on leaving the West Bank would not be limited by any defined test (“decidedly security reasons”), or time and would obviate the need for an appeals committee.
- 34- The circumvention of the authority granted to the respondent in the order has also created a situation wherein the decision to prevent the petitioner from travelling abroad was made without a hearing and without him being given – not even *in précis* - the reason for the imposition of the restriction.
- 35- The petitioner shall therefore argue that the decision considered in this petition violates the principle of legality and the rights of the petitioner, which are set out in the natural rules of justice, such as the right to a hearing and appeal.
- 36- The petitioner means to develop on these arguments, which are being written hastily due to the urgency of the petition, during the verbal hearing.

B. The violation of freedom of movement

- 37- The position of the petitioner is that the respondent has violated the petitioner's right to freedom of movement, which is anchored in four separate and mutually-reinforcing relevant legal fields. The respondent violated this right without meeting the criteria that allow for exceptions to the obligation to respect fundamental rights.
- 38- First, the petitioner will argue that the restriction imposed on his right to freedom of movement was illegal on the basis of international humanitarian law and in particular the laws of belligerent occupation, which bind the military administration in the West Bank.
- 39- Second, the petitioner will base his petition on international human rights law – both as an independent source and as a source for interpreting humanitarian law.
- 40- Third, it will be argued below that the petitioner enjoys enhanced protection against restrictions on his movements by the government by virtue of his status as a human rights defender.
- 41- And fourth, the petitioner will consider the Israeli constitutional law, which establishes the right to freedom of movement as a constitutional right. Of course this legal framework, which is based on the Basic Law: Human Dignity and Freedom, which strengthened and reinforced the Court's judgments on freedom of movement, applies in our case through the "backpack" of the military commander, as was said in H CJ 393/82 **Jam'it Iksan vs. the Commander of IDF Forces**, v.37 (4) 785, 809-810 (our emphasis):

"Every Israeli soldier carries with him in his backpack the rules of international public customary law that concern the laws of war and the basic rules of Israeli administrative law".

I. The International Rules on Belligerent Occupation

- 42- Article 43 of the Regulations annexed to the Fourth Hague Convention Concerning the Laws and Customs of War on Land , 1907 (henceforth: "the Hague Regulations") lays down the fundamental rule of belligerent occupation – the duty of the occupying power to restore public order and security in the occupied territory. According to this rule, the occupying power must restore civilian life to its normal order, inasmuch as possible. This includes the duty to ensure connections with the outside world and the possibility for civilians to travel abroad and to enter the occupied territory.

- 43- Thus, by imposing on the occupying power the duty to allow the continuation of normal civilian life, and through a number of additional treaty obligations, the laws of belligerent occupation provide a sort of bill of rights for the civilians in the occupied territory, which replaces for the period of occupation the constitutional order previously in force.
- 44- The primary right recognised by the laws of occupation to protected civilians is human dignity. Therefore it is the primary duty of the occupying power to protect human dignity. In the international laws of occupation, just as in Israeli constitutional law, a number of ancillary rights may be derived from the right to dignity (the right to dignity is mentioned in many articles of the relevant conventions on belligerent occupation including: common Article 3 of the Geneva Conventions, Article 27 to the Fourth Geneva Convention and Article 75 to the First Protocol which have all been recognised as customary international law).
- 45- The right to freedom of movement of protected civilians, then, is simultaneously derived from the abovementioned duty of the occupying power to restore public order and security, from the duty to fulfil the basic needs of the population and from the protected civilians' right to dignity – which is the most fundamental of all rights and from which numerous other fundamental rights derive.
- 46- Further, under the Fourth Geneva Convention protected civilians have the right to leave the territory, although the occupying power may prevent them to do so if their departure is contrary to “the national interests of the state”:

All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State.

If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

(Article 35 of the Convention)

- 47- Whether the above quoted Article 35 deals with the issue of individual requests to exit or rather regulates the right of the occupying power to close the borders entirely (as suggested by the final part that deals with refusing a “person”), the right to leave the territory in which the conflict is taking place is the rule, while the prohibition of exit is the exception. A key parameter to define the scope of the exception is the issue of the temporariness of the situation of the protected person. That is, weight should be given to

the fact that the West Bank area in which the petitioner lives has been under prolonged occupation for forty years. Relevant to this matter are the words of Prof. Yafa Zilberschatz according to which:

“The closures of the borders of the occupied territories might perhaps be appropriate for in the case of a short-termed military occupation lasting a few months, but in the case of a prolonged occupation, such as that of Israel in Judea, Samaria and Gaza, it is difficult to consider the occupied territories as closed territories, which that people are legally prevented to leave”.

Yafa Zilberschatz, “Freedom of movement: entry into the country, staying in it and leaving it”, in **International Law** (2003) (Ruby Siebel, ed.) 189, 217

48- This approach, which would distinguish between short-term occupations and prolonged occupations, has been adopted by this Honourable Court in HCJ 393/82 **Iksan et.al. vs. the Commander of IDF Forces in the West Bank et.al.**, v. 37 (4) 785, 800-802.

49- Either way, it is clear that humanitarian law grants the petitioner the right to freedom of movement and that this has been and is being violated by the respondent’s decisions.

II. International Human Rights Law

50- The petitioner will argue that the right to freedom of movement provided for in the laws of belligerent occupation should be interpreted in light of international human rights law, which also applies to the activities of the IDF in the West Bank.

51- This interpretative procedure has been accepted both in the Advisory Opinions of the International Court of Justice in the Hague (ICJ), which determined that the relationship between humanitarian law and human rights law is the relationship between a special and a general law, as well as in the judgments of the Honourable Court. On this matter see:

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 (I) I.C.J. 66;

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 2004, para.102-114.

52- That is, even according to a narrow approach that grants human rights law an interpretative rather than independent standing in the occupied territory (an approach that we do not

share), its provisions will apply to any situation for which humanitarian law has no clear and unequivocal rule.

53- International courts have expressed their opinion that humanitarian law should not be seen as an alternative system to human rights law but rather as a special framework in addition to the full and universal applicability of human rights law, which is intended to protect all people in any situation.

54- Moreover, in the Advisory Opinion of the ICJ concerning the Separation Wall mentioned above, it was determined that human rights law applies in parallel to humanitarian law, and that the exceptions to its applicability are provided for in its provisions, as can be seen in Article 4 of the International Covenant on Civil and Political Rights. As mentioned in paragraph 106 of the Advisory Opinion:

"More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind found in art. 4 of the ICCPR..."

55- In any event, the right to freedom of movement enjoys wide protection in various international instruments. The first and foremost of these is the Universal Declaration of Human Rights of 1948, whose Article 13(2) states:

"Every one has the right to leave any country, including his own, and to return to his country".

56- Article 12(2) to the International Convention on Civil and Political Rights of 1966 (henceforth: ICCPR) determines that:

"Every one shall be free to leave any country, including his own"

57- Identical phrasing appears in the Fourth Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth: ECHR).

58- The American Convention on Human Rights of 1969 (IACHR) also states in its Article 22(2) that:

"Every person has the right to leave any country freely, including his own"

59- Finally, it is worth mentioning that under Article 12(2) of the African Charter on Human and Peoples' Rights of 1981 (AdCHR):

“Every individual shall have the right to leave any country including his own, and to return to his country”

60- It can be seen, then, that the right to leave and return to one’s own country is established both in universal and regional conventions, including the UN International Covenant on Civil and Political Rights, 1966, which Israel signed and ratified and that came into force in respect to Israel on 3 January 1992

61- Due to the fact that this right has been recognised in a long list of international conventions, declarations, decisions, reports and international documents, as well as in the national legislation of many States (including Israel), it can be said with certainty that the right to leave any country is a customary right (see Yafa Zilberschatz, “The right to leave a country”, **Mishpatim** 23 (1994) 70, 83)

62- International human rights law, however, provides for an exception to the right to leave the country (see Article 2(3) to the ECHR, Article 12(3) to the ICCPR). The scope of this exception is very narrow and is defined as follows (the following is the phrasing of the ECHR):

“No restriction shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety”.

63- That is: any restriction on the freedom of movement within and outside the borders of a state must meet the following conditions:

- a. The restriction is explicitly authorised by law;
- b. The imposition of the restriction is essential in a democratic society;
- c. The restriction is necessary for the sake of national or public security;

64- According to this interpretation, the scope of the exception to the right of freedom of movement concerning the right to leave a country is extremely narrow. Restrictions may be imposed only if the interests that the exception is meant to protect would otherwise certainly be prejudiced.

65- In the case before us the restriction on the petitioner’s right was not imposed according to procedures set out in the Israeli law (as argued in the previous section). As regards the other two conditions, the petitioner is convinced that they are not satisfied although he

doesn't know the exact content of the respondent's claims against him (which are kept secret).

66- The failure to satisfy the second condition (that the exception be necessary in a democratic society) is especially clear in light of the fact that the petitioner is a human rights activist, as further developed below.

III. Protection of Human Rights Defenders

67- The petitioner will argue that in his case not only his right to freedom of movement as a person is relevant, but also the enhanced right to unhindered movement granted to human right defenders. Reference is made to a developing branch of international law, which establishes enhanced protection for those who deal with defence of human rights, like the petitioner.

68- In 1999, marking the fifty year anniversary of the establishment of the United Nations, the General Assembly of the UN approved the "Declaration on Human Rights Defenders". This declaration defined basic rights, which the Member States of the UN are asked to protect as far as human rights defenders are concerned. Under Article 5 of the Declaration (my emphasis, M.S.):

"Article 5: For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at national and international levels:

*(a) **To meet or assemble peacefully;***

(b) To form, join and participate in non-governmental organizations, associations or groups;

*(c) **To communicate with non-governmental or intergovernmental organizations."***

"Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect Universally Recognized Human Rights and Fundamental Freedoms" (UN General Assembly Resolution 53/144, March 1999(A/RES/53/144)).

69- Further, the preamble of the Declaration makes clear that the absence of peace is not a justification for non-compliance with its provisions (my emphasis, M.S.):

“...Recognizing the relationship between international peace and security and the enjoyment of human rights and fundamental freedoms, and mindful that the absence of international peace and security does not excuse non-compliance”

70- Therefore, human rights defenders have been recognised as a special group that requires special protection, like other representatives of civil society including journalists, staff of humanitarian aid organisations and medical teams.

71- This makes much sense. Human rights activists are a target for authorities they criticise, like journalists. Authorities – especially in territories where there is no democracy, like occupied territories – are highly tempted to interfere with their activities and prevent their free operation. Therefore, and considering the importance of the work of human rights activists, international law grants them special protection.

72- Unhindered movement – within and outside the territory – is a precondition for the work of human rights defenders and human rights organisations. Therefore, their freedom of movement needs to be guaranteed not only in their private interest, but also in furtherance of a wide social interest.

73- A report submitted in 2006 by the Special Representative of the Secretary-General on the situation of human rights defenders, following a visit in Israel and the Territories, explicitly addressed the limitations on freedom of movement imposed on human rights defenders in the occupied territories (my emphasis, M.S.):

“Restrictions on the freedom of movement resulting from the Wall and other barriers, checkpoints, closures, requirement of permits and bans imposed on defenders to travel; use of excessive force on peaceful action to protest; use of security and anti-terrorism laws to place defenders under administrative detention; unsubstantiated allegations to undermine their credibility and other forms of harassment, intimidation and humiliation of defenders has rendered their situation absolutely incompatible with international norms and standards of human rights or the principles set forth in the Declaration.”

(Excerpts of the 2006 Report of the UN Special Representative of the Secretary General on the situation of Human Rights Defenders, Country Visit to Israel and the Occupied Palestinian Territory, E/CN.4/2006/95/Add.3, 10 March 2006 (p.3)).

74- The petitioner is a veteran human rights activist and current director of “Al Haq” and wants to leave the country to participate in conferences, seminars and working meetings on

human rights, to which he is invited in the course of his work. As we shall see below, the goal of the petitioner's journey is significant to the question of the balance that needs to be struck between the right of movement and interests that contradict it. The petitioner will argue, in compliance with the Declaration on Human Rights Defenders, that the fact that he is asking to leave for the purpose of participating in an international conference on human rights is significant and also relates to his right to freedom of speech.

IV. Israeli Constitutional Law

75- Freedom of movement has been a basic principle in the Israeli legal system long before the Basic Law: Human Dignity and Freedom came into force, but there is no doubt that this principle was strengthened once reaffirmed in article 6(1) to the Basic Law. (see for example: HCJ 111/53 **Haya Kaufmann vs. the Minister of the Interior** v.7 534; HCJ 448/85 **Daher vs. the Minister of the Interior** v.40 (2) 701 (henceforth: **HCJ Daher**). After the enactment of the Basic Law Human Dignity and Freedom see for example HCJ 4706/02 **Salah vs. the Minister of the Interior** v.56 (5) 695 (henceforth: **HCJ Salah**); HCJ 3914/92 **Leah Lev vs .the Regional Rabbinical Court in Tel-Aviv** v.48 (2) 491).

76- This principle, recognised both before and after the enactment of the Basic Law: Human Dignity and Freedom, has also been considered relevant with respect to the activities of the IDF in the Territories, thus granting freedom of movement to the Palestinian civilians living in the West Bank. As (then) judge Beinisch said in HCJ 9593/04 **Rashed Morrar vs. the Commander of IDF Forces in Judea and Samaria** (not yet published):

“Freedom of movement is among a person’s most basic rights. We have insisted that in our legal system freedom of movement has been recognized both as a basic right that stands on its feet, and as a right derived from the right to freedom, and some even claim that it is a right derived from human dignity. Freedom of movement is also recognized as a basic right in international law and this right is anchored in a series of international conventions.”

77- The anchoring of freedom of movement in a basic law dealing with human dignity and freedom reflects the ancient wisdom that freedom and movement are connected and cannot be separated. The Greek philosopher Epictetus defined freedom as follows: “I go wherever I want and return whenever I want”. see Yafa Zilberschatz, “The right to leave a country”, **Mishpatim** 23 (1994) 71)

78- Indeed, every right, even one which is strictly related to a person's freedom, does not stand in a legal *vacuum* but is part of a system of rights and interests that need to be balanced. In a judgment concerning an order forbidding one to leave the country according to emergency regulations, where it was argued that the right to leave the country contradicts the interest of protecting state security, the test that allows to strike the balance between the individual right and the general interest of the State is that of honest and serious concern for harm. As will be seen below, in our understanding in this case the test should be made more severe.

79- In the aforementioned HCJ Salah (4706/02) the hon. judge Tirkel determined measures and criteria that should be weighed before restricting the freedom to leave the country. Among these criteria, the severity of the harm inflicted should be examined in light of the geographical extent of the restriction, the extent of time over which it is imposed and the reason for the request to go abroad.

80- In this case the petitioner's right to leave the Territories has been subject to a total restriction and in practice his range of movement is limited to the confines of the West Bank. In addition, the petitioner has been prevented from travelling abroad since March 2006, that is, he has been deprived of his right of movement for a year and four months now. Since no administrative order has been issued, it would appear that the restriction is not limited in time and could remain in force forever.

81- As mentioned, the purpose of the journey is also an important factor in order to balance the restriction of the right of movement with the protection of the state's interest in security. As judge Tirkel wrote in the said HCJ Salah:

“The purpose and destination of the journey are important considerations in order to assess the legality of the restriction of the right. Restricting the right to leave the country of someone whose presence abroad is vital and important may constitute a particularly severe violation of his rights . For example, the situation is different if a person intends to leave to receive medical treatment or just for tourism. In addition, preventing a person who wants to undertake a pilgrimage to a place holy to his religion to exit the country is a violation of his right to freedom of religion and worship, and as such is particularly severe”.

(emphasis added, M.S.)

82- The petitioner wishes to leave the West Bank in order to attend an international conference on peace and justice, which will take place in Germany this coming June. His journey, then, is part of his work as the director of a human rights organisation. As it is well known, the

exchange of information and opinions with their colleagues overseas is a fundamental part of the work of human rights organisation. These connections are established, among other things, by participating in meetings, giving lectures and attending conferences.

83- Since March 2006, the petitioner has wanted to leave to go abroad several times. On all these occasions he needed to leave the country in order to meet with representatives of foreign and international human rights organisations. The journey now under discussion (to Germany) is also vital, not only to the petitioner but also to the sensitive fabric of government maintained in the occupied territories, where the activity of human rights organisations is particularly vital.

84- The purpose of the petitioner's journey, then, is to represent the human rights organisation that he heads at a conference dealing with peace and justice. The purpose of the petitioner's journey is to talk and listen, to exchange opinions, all for the sake of strengthening human rights in the Territories. **The goal of the petitioner's journey, then, also falls under the scope of the principle of freedom of expression, which is also, of course, a fundamental principle of our legal system, especially in respect to political expression, which is more protected than any other type of expression** (see HCJ 606/93 **Kidum Entrepreneurship and Publishing vs. the Broadcasting Service**, v.48 (2) 1)

85- *The approach that argues that the purpose of the journey should be examined in order to better balance the right of movement and the interest of protecting state security, is also supported by American scholars. American juridical record reveals a controversy over the question of determining under which amendment to the American Constitution does the right to freedom of movement fall. While some judgments place it under the first amendment to the Constitution and consider it as a corollary of the right to freedom of speech, others place it under the fifth amendment and the right to due process. In light of these controversies, American scholars argue that the right to freedom of movement should not be confined to a single amendment. Inasmuch as the purpose of the journey is to enjoy the right enshrined in the first amendment to the constitution, restrictions can be imposed only where there is a clear and present danger to the general interest which the freedom of speech needs to be balanced with. See Yafa Zilberschatz, "The right to leave a country", **Mishpatim** 23 (1994) 70, 105)*

86- An approach that sees in freedom of movement a right that is as important as freedom of speech also appears in the judgment of vice-president Ben Porat in HCJ Daher mentioned above:

“...regarding our matter, this is not about freedom of speech but about freedom of movement, but obviously these are equally important rights, as the learned advocate of the petitioners claims”.

87- Inasmuch as we adopt the approach of the hon. judge Tirkel in the Salah affair and the approach of the hon. Vice-president Ben Porat in the Daher affair regarding the importance of the right of movement compared to other interests, then **in our case a test should be adopted that is even more severe than the test of “honest and serious concern”**. This would therefore allow limitations of the petitioner’s freedom of movement only where danger to state security is almost certain, thus applying to this case the test provided by our law for the restrictions on freedom of speech.

88- Further in this case we should be guided by the words of the hon. vice-president Ben Porat, who remarked in HCJ Daher:

“The severity of the threat, which raises sincere and serious concerns, should also be taken into account, since the concern for state security can take different forms and be expressed in different manners with different degrees of severity. A threat of small or relatively slight consequence is not the same as a threat that affects a really vital interest”

(ibid. paragraph 4, emphasis added, M.S.)

And it is not superfluous to recall the words of the hon. judge Bach in the same affair:

*“In summary we can say: The ‘serious’ concern, which justifies issuing an order to prohibit a person from leaving the country, **must be based on the assessment that there is a real danger that that person’s journey abroad would imply a meaningful danger to state security**, and in order to define the test from the negative aspect, I would say that the meaning of the expression ‘serious concern’ is that a slight, marginal, remote or only theoretical concern does not justify the issuance of an order to prevent leaving according to regulation 6. **We should especially consider that the fact that the activity of a citizen abroad appears undesirable or even damaging from the point of view of the national or diplomatic aspirations of the elected government or the majority of the residents of the country, does not in itself justify the issue of an order preventing that citizen from leaving the country”**.*

(ibid., paragraphs 10-11)

89- And let us remember that HCJ Daher and HCJ Sakah dealt with restrictions on freedom of movement by means of administrative orders prohibiting exit from the country according to regulation 6 of the Emergency Regulations. These restrictions, therefore, fulfilled the condition of the respect for the principle of legality. Nonetheless, the judge's assessment of the balance between the individual right and the collective interest involved are relevant to our case. Moreover, the petitioner will argue that when the restriction on freedom of movement is imposed without the backing of a specific authorising law (inasmuch as such restriction is legal as said above in the first section of the legal argument) the respondents need to present evidence that a substantial danger will almost certainly materialise if the restriction on exit is removed, to prove that the required condition of the existence of a danger for state security is fulfilled. It is superfluous to remark that the alleged evidence against the petitioner should be specific and based on reliable and up-to-date concrete information in order to prove the existence of a danger to state security.

C. Lack of Proportionality

90- The petitioner has not been allowed to leave the West Bank for a year and four months; he is not allowed to leave for any destination or for any purpose; the limitation on his freedom of movement was imposed without a trial or a trial-like procedure of any kind; he has been given neither the right to be heard, nor the right to question the legality of the restriction, nor the right of appeal; the restriction is very severe and it is unlimited in time.

91- In any case, the respondent is duty bound to consider the adoption of less restrictive measures and also to assess whether the restriction is proportioned to the good that results from it, if any.

92- In the Salah affair the hon. judge Tirkel affirmed that in order assess the proportionality of a restriction to a basic right, it is necessary to consider its time-length:

*“As to the severity of the restriction on the right – or the “proportionality” of the restriction – the time-length of the restriction should also be considered. **The more prolonged the restriction, the more severe the violation. A prohibition to leave the country for a few days is not the same as a prohibition imposed for several months or even years.**”*

(emphasis added; M.S.)

93- All the information available to the petitioner indicates that a genuine and serious assessment as described above has not been undertaken.

94- It also indicates that in the case before us the respondent did not strike the appropriate balance between the conflicting interests involved.

95- It appears therefore that the respondent has severely violated the petitioner's rights and has done so without any justification and without the restriction imposed on the petitioner's right falling under any exception provided by the law.

For all of these reasons the Honourable Court is requested to grant a conditional order as requested, and after receiving the answer of the respondents and after a hearing to make such an order absolute.

In addition, the Honourable Court will be asked to charge the respondent with the petitioner's legal fees, his attorney's retainer, including VAT and legal interest from the day of the judgment to the actual payment.

Michael Sfard, Advocate

The petitioner's attorney

[Note: Appendices not attached to this translation]