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Court for Administrative Affairs in Beer Sheva

AdmPet 11268-02-11 Kishawi v. Ministry of Interior

Before Hon. Justice Eliyahu Bitan

The Petitioners:

1. **Umayma Hamed Mahmoud Kishawi**
2. **Fakhriya Hamed Mahmoud Kishawi**
3. **Anwar Yihya Hassan Bulbal**
4. **Widad Ahmad Abd-al-Rahim Kishawi**
5. **Nafuz Ibrahim Khalil Sheikh-Yussef**
6. **Latifa Saleh Mahmoud Sheikh-Yussef**
7. **Karima Muhammad Salman Ihrawat**
8. Gisha: Legal Center for Freedom of Movement

Represented by counsel, Adv. Nomi Heger and Tamar Feldman

v.

The Respondent:

1. **Minister of Interior**
2. **Minister of Defense**
3. **GOC Southern Command**

Represented by counsel, Adv. Noam Hat-Makov, South District Attorney, Civil

Judgment

General

1. Petitioners 1-7 are Muslim women who reside in the Gaza Strip. Petitioner 8 is an Israeli organization whose official goal is to "protect human rights in Israel and in the territories under its control".

2. Petitioners 1-7 requested the competent officials to allow them to enter Israel on the birthday of the Prophet Muhammad, which fell on February 15, 2011 this year, in order to pray at the al-Aqsa Mosque in Jerusalem. Their request was denied on the grounds that at the present time, entry from the Gaza Strip into Israel is possible only in exceptional humanitarian cases.

3. The petition was filed at the court on February 7, 2011. Therein, the court was requested to instruct the respondents to allow petitioners 1-7 to enter Israel for the purpose of prayer at the al-Aqsa Mosque in Jerusalem and participation in religious ceremonies celebrating the birth of the Prophet Muhammad, or at some other religious festival, subject to individual security screening as accepted. The petitioners requested that, if time constraints precluded a hearing of the petition prior to the date of the birthday of the Prophet Muhammad, the court review the issue of freedom of worship which they had been denied, so that they may be able to realize it at another time.

4. The petitioners claimed that preventing their entry into Israel is a violation of their individual rights, their freedom of worship and their freedom of movement and that it constitutes discrimination between them and Christian women from the Gaza Strip, who are permitted to enter Israel.

5. The respondents argued that as the date on which the petitioners sought to enter Israel had passed, the petition had become theoretical and should not be reviewed. They argued that it should also be rejected on its merits, primarily since one should not intervene in the respondents' decision which is anchored in government policy. The petitioners do not have a right to have their request granted and the fact that some permits to enter Israel are given to Christians from the Gaza Strip should not be viewed as discrimination that necessitates permits be given to the petitioners as well.

Deliberation and Ruling

1. Indeed, the petitioners sought to enter Israel on a specific date and this request was denied by the respondents. Once the date passed, the petition became theoretical. The petitioners have not filed a request to enter Israel on another date and, it follows, such request was not reviewed by the relevant officials and no decision was made therein. The necessary result thereof is the rejection of the petition *in limine*. However, in the context of the fact that the rejection of the petitioners' request was unrelated to the particular date on which they sought to enter Israel, but rather to the respondents' general, categorical position, which may lead to additional petitions on the same issue, I have decided to review the petition on its merits.

2. Having reviewed the petition and the preliminary response thereto, and having heard parties' arguments, I have reached the conclusion that the petition must be rejected on its merits.

3. The premise is that Israel, like any sovereign state, has a right to determine who enters its territory and residents of the Gaza Strip, like any foreign subject – and given that the Gaza Strip is controlled by a murderous terrorist organization which relentlessly endeavors to harm the State of Israel and its residents – even less than most foreigners seeking entry into Israel, have no vested right to enter Israel (see HCJ 2828/00 Kowalski v. Minister of Interior, PD 57(2) 21; HCJ 9132/07 Jaber al-Basyuni Ahmad v. The Prime Minister – published in "Nevo" ; HCJ 9657/07 Jarbu' v. Military Commander in the West Bank – published in "Nevo"; HCJ 1912/08 Physicians for Human Rights v. IDF Commander in the Gaza Strip – published in "Nevo").

4. Concretely, on September 19, 2007, the Ministerial Committee for National Security of the Government of Israel decided to impose restrictions on the movement of people to and from the Gaza Strip. The resolution reads as follows:

> Hamas is a terrorist organization that has taken control of the Gaza Strip and turned it into hostile territory. This organization engages in hostile activity against the State of Israel and its citizens and bears responsibility for this activity.
>
> In light of the foregoing, it has been decided to adopt the recommendations

> that have been presented by the security establishment, including the continuation of military and counter-terrorist operations against the terrorist organizations. Additional sanctions will be placed on the Hamas regime in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. Restrictions will also be placed on the movement of people to and from the Gaza Strip. The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the intention to avoid a humanitarian crisis.

5. On the basis of this resolution, entry of individuals from the Gaza Strip to Israel is prevented with the exception of humanitarian cases, primarily urgent medical cases, which are examined on their merits.

   This decision expresses government policy and belongs to the field of foreign relations, strategy and security which are in the scope of the government's powers and responsibility and in which the court generally should not intervene.

   The aforementioned decision has been examined on a number of occasions in the context of petitions filed to the High Court of Justice and the court did not find cause to intervene therein (HCJ 9132/07 Jaber al-Basyuni Ahmad v. The Prime Minister; HCJ 5268/08 Rami Saker Isma'il 'Anbar et al. v. GOC Southern Command – published in "Nevo" and the many judgments cited therein).

6. With respect to international law, indeed as of September 12, 2005, Israel no longer holds the Gaza Strip under "belligerent occupation" and has no effective control over what occurs in said territory. Since then, Israel's primary obligations have been reduced only to the "basic humanitarian needs of the residents of the Gaza Strip" (see HCJ 9132/07 al-Basyuni above).

7. Basic humanitarian needs are the needs relevant to a person's subsistence, such as health, food, water, clothes, shelter, etc. In the abovementioned HCJ 5268/08, the court reviewed a petition filed by relatives of prisoners from the Gaza Strip who are incarcerated in Israel against the state's decision to stop allowing them entry into Israel in order to visit their relatives in prison. The Supreme Court rejected the petition and ruled that: "[**p]ermitting residents to enter Israel for this purpose is not among the basic humanitarian needs of Gaza residents which Israel is obliged to allow even today.**"

   Prayer in general, and in a specific location in particular, is far from coming under the terms of "basic humanitarian need". As such, the decision rejecting the petitioners' request to enter Israel in order to pray in the al-Aqsa Mosque is lawful and reasonable and there is no cause to intervene therein.

8. The petitioners' allegation that their freedom of worship, freedom of movement and the various provisions of the Hague Regulations impose a duty on the respondents to allow their entry into Israel, in the words of the petition: "the State of Israel has a duty to allow members of all faiths freedom of worship, respect for religious customs and access to the holy places, all of which intensify its duty to allow the petitioners access to the al-Aqsa Mosque in Jerusalem" – are unfounded, baseless and express misplaced use of "human rights" concepts.

   The petitioners, as any other foreign national, do not have a right to freedom of movement or worship inside Israel such that gives rise to a duty on the part of the state to allow them entry thereto. These matters are clear and simple.

   Even if Israel continued to control the Gaza Strip, there would have been no grounds to compel it to allow residents of the Gaza Strip to enter it for the purpose of religious worship. The conventions

relating to the rights of the civilian population in a held territory refer only to rights which must be upheld or actualized **inside the held territory itself.** They do not compel the holding party to allow the population of the held territory to enter the territory of his state, nor do they entitle said population to freedom of movement or any other freedom within the territory of the holding country.

9. The petitioners' demand that their case be individually examined and that a decision whether or not to allow them entry into Israel be made based on the findings of an examination whether their entry into Israel poses a security risk is inconceivable. Firstly, there is no justification to favor the petitioners over others from the Gaza Strip to whom the general policy denying entry into Israel save for in exceptional circumstances is applied. Secondly, if the petitioners' request to review their matter on an individual basis is admitted, what justification could there be to oppose individually examining 70,000 or perhaps even 700,000 others from the Gaza Strip who might seek to reach Jerusalem? In the context of the case at bar, there is no real difference between residents of the Gaza Strip and residents of any other enemy state about whom the same arguments that appear in the petition could also be made: that their individual rights and their freedom of worship and freedom of movement require the State of Israel to allow their entry to Jerusalem, unless an individual examination reveals that the entry of a specific individual among them to Israel poses a security threat. Accordingly, there would be room to compel the state to establish a mechanism suitable for conducting individual examinations of every enemy subject who wishes to make a pilgrimage to Jerusalem, potentially millions, and perhaps even to give each one the right to a hearing. There would be a need for a mechanism that escorts them while they are in the country and sees to their departure upon completion of the religious worship etc. etc. Any reasonable person understands how unrealistic this demand is (see HCJ 5539/05 Ghadir 'Atallah v. Minister of Defense – published in "Nevo"; HCJ 11120/05 Osama Mahmud Hamdan v. GOC Southern Command – published in "Nevo").

10. The petitioners argue that they are to be allowed free access to the Muslim holy sites in Israel pursuant to the Protection of Holy Places Law, 1967. This argument too is baseless. This law makes no reference to the issue of entry into Israel by foreign nationals wishing to reach the holy places therein and it is not relevant to the case at bar.

11. The petitioners' argument regarding discrimination between them and Christian residents of the Gaza Strip who are given some opportunity to reach holy sites in Israel must also be rejected. In its response, the state explained that over the last three years, the entry of Christian residents of the Gaza Strip to Israel for the purpose of prayer in Bethlehem and Nazareth was allowed during the major Christian holidays, subject to quotas that have been put in place. The decision was made for "political, strategic, security and humanitarian" reasons "relating to Israel's foreign policy, in view of the fact that this is a persecuted population that has few possibilities to hold religious ceremonies and worship in the Gaza Strip, unlike the Muslim population which, aside from the possibilities at its disposal within the Gaza Strip itself, is allowed to exit Gaza for the purpose of travel to Mecca, mostly via Egypt". These arguments speak for themselves and refute the presumption on which the allegation of discrimination rests: that these are populations with similar parameters which receive different treatment.

    Moreover, even if these were similar populations, a state has a right to decide, due to political and other considerations, to grant certain foreign nationals benefits, reliefs, aid etc. and not to grant these to a different population of foreign nationals. In this context, residents of the Gaza Strip have no right *vis-à-vis* the state and the state owes them nothing. Is it conceivable to accept demands by a group of people from a certain country to compel a nation that provided aid to some residents of the group's country or to another country to grant them the same benefit?

12. In conclusion, the respondents' policy which prohibits the entry of residents of the Gaza Strip to Israel and the manner in which it is implemented are lawful and reasonable and there is no cause to intervene therein. There are no grounds for the petitioners' demand to compel the respondents to allow them to enter Israel in order to pray at the al-Aqsa Mosque or any other place. The petition is dismissed.

Costs

1. Judicial time is costly and limited and the number of petitions filed with the High Court of Justice and the administrative courts is great. A balance must be struck between the interest of keeping the doors of the court open to the public and the interest of using judicial time in the best possible way and avoiding its' squandering. One of the tools for controlling the number of actions brought before the courts is to impose substantive costs – as is the norm in many properly functioning countries in the world (see CivA 2617/00 HCJ 891/05 Kineret Quary (limited partnership) v. Local Planning and Building Committee, Natzrat Illit et al. PD 60(1) 600).

   A large proportion of the petitions filed with the courts in Israel are filed by "human rights" organizations. In cases where the submission of a petition by such an organization is justified, indeed, when the court dismisses it, it takes the fact that this is a "public petitioner" into account and does not take a heavy handed approach when it comes to the costs imposed on the organization. In other cases, there is no justification for giving the aforesaid organizations special treatment with respect to costs and they must be treated as any other petitioner.

2. Petitioner 8 is an Israeli organization which defines itself as an organization whose goal is "protecting human rights in Israel and in the territories under its control, including the right to freedom of movement". It routinely files administrative proceedings and should be regarded as a "professional petitioner" with everything the title entails. The petition it filed was dismissed, and it must be said that there was no justification for submitting it in the first place. As such, I see no room for considering the petitioner's "public nature" with respect to costs.

3. I order the petitioners, together and separately, to pay the respondents' costs to the sum of 25,000 NIS.

Given today, 7 Iyar 5771, 11 May 2011, in the absence of the parties.

[signed]

Eliyahu Bitan, Judge