

At the Supreme Court
Sitting as the High Court of Justice

HCJ 5137/18
Hearing scheduled for May 15, 2019

1. **Wa'el Wadia**
2. **Walid Wadia**
3. **Gisha – Legal Center for Freedom of Movement**
Represented by counsel, Adv. Muna Haddad; Osnat Cohen-Lifshitz; Moria Friedman Sharir; Sigi Ben-Ari from “Gisha” –
Legal Center for Freedom of Movement
42 Harakevet Street, Tel Aviv 67770
Tel. 03-6244120, Fax 03-6244130
e-mail: [info@gisha.org.il](mailto:info@gisha.org)

The Petitioners

v.

1. **Minister of Defense**
2. **Coordinator of Government Activities in the Territories**
3. **Gaza Coordination and Liaison Administration**
4. **Land Crossing Authority**
Represented the State Attorney's Office, Ministry of Justice
29 Salah al-Din Street, Jerusalem 9711052
Tel. 02-6466590; Fax 02-6467011

The Respondents

Response to the Petition on behalf of the State

1. According to the decisions of Honorable Justice A. Baron, including extensions granted, a response on behalf of the State to the captioned petition is hereby submitted ahead of the hearing thereof scheduled for May 15, 2019.
2. In the petition at hand the Honorable Court is requested to issue an order nisi “directed against the Respondents, ordering them to appear and show cause why they would not:
 1. Allow Petitioners 1 and 2, residents of the Gaza Strip and corporate managers of the Sarayo al-Wadia company located in Gaza, to market the goods manufactured by the company to the West Bank and to export them abroad;
 2. Allow the export and marketing of non-agricultural goods, including all processed food products, originating in Gaza to markets in the West Bank and abroad;
 3. Provide to the Petitioners and release to the public the guidelines and procedures for obtaining the Civil Liaison Administration's (CLA) approval for the sale and export non-agricultural goods from Gaza and the procedures for processing such applications.”
3. The position of the State, specified in detail below, is that the petition should be denied.

Relevant Background – Main Points

4. The following are the main points of the relevant background as provided by the Respondents' officials.
5. The petition at hand concerns the application of Petitioners 1-2, residents of the Gaza Strip and corporate managers of Sarayo al-Wadia, as stated in the petition, to ship food products manufactured by the company for export abroad and sale in the Judea and Samaria Area. According to the petition, the company manufactures cookies, wafers, potato chips and Krembo [chocolate covered marshmallow cream wafers] (see page 3 of the petition).
6. Following the implementation of the disengagement plan in 2005, whereby IDF forces withdrew from the Gaza Strip, Israel's belligerent occupation of the Gaza Strip came to an end, bringing about a significant shift in Israel's obligations towards the local population. On this issue, compare H CJ 9132/07 **Ahmed v. Prime Minister** (January 30, 2008), where the following was held, *inter alia*:

“[...] since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. **In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip. In the prevailing circumstances, the main obligations of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip;** these obligations also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.”

(Paragraph 12; emphasis added).*

7. As is known, in 2007, the Hamas organization, a terror organization that has made it its objective to harm Israeli citizens and soldiers, seized control of the Gaza Strip. Consequently, various restrictions were imposed on travel and on the movement of goods to and from the Gaza Strip. These measures included, to the best of our knowledge, a near-complete moratorium on the export and sale of goods outside the Gaza Strip.

* Translation by the Supreme Court of Israel, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\07\320\091\n25&fileName=07091320_n25.txt&type=4, last accessed May 11, 2019.

8. In 2010, the civilian-economic policy concerning the transport of goods to and from the Gaza Strip changed, when a decision was made to allow, in principle, the export of goods from the Gaza Strip abroad, and subsequently to the West Bank as well.

Exit of goods from the Gaza Strip for the purpose of export abroad

9. Thereafter, provisions regarding export from the Gaza Strip were established in the "Procedure regarding Export from the Gaza Strip" (hereinafter: "**Export Procedure**", or "**Procedure**"), which was released in June 2015 and is posted on the website of the Coordinator of Government Activities in the Territories (COGAT).¹ (the Procedure was also attached to the **petition** as Exhibit **P/4**).

A photocopy of the Export Procedure is attached and marked **R/1**.

The Export Procedure contains a list of instructions for receiving permits to export goods out of the Gaza Strip. One fundamental provision stipulated as a condition for export is that "**Coordinating export will be carried out by the Palestinian Authority's Palestinian commercial coordinator vis-à-vis the Gaza CLA alone. Export priorities will be set by the Palestinian commercial coordinator, who will forward the list for which coordination is requested to the Economic Coordination Division at the Gaza CLA**" [Section 4(d)(1) of the Procedure] (emphasis added).

It is noted, in this context, that **said demand to have the Palestinian Civil Affairs Committee forward an application is a base requirement for applications for the movement of both people and goods from the Gaza Strip**. As stated, these applications will be processed by the Gaza CLA inasmuch as they are forwarded by the Palestinian Civil Affairs Committee, which is the agency responsible for contact with Palestinian residents in the Gaza Strip. As the agency acting on behalf of the Palestinian Authority in the Gaza Strip, it exercises independent discretion with respect to collating and prioritizing the transfer of applications made by Palestinian residents to the Israeli side.

The Export Procedure further stipulates that: "Export will proceed according to export capacity at Kerem Shalom Crossing, and applicable security procedures" [Section 4(d)(2) of the Procedure]. In this context, it is noted that the transport of goods from the Gaza Strip via Israel is carried out via Kerem Shalom Crossing, which is currently operated by the Land Crossing Authority at the Ministry of Defense. The procedure also establishes that "Export will proceed according to the procedures of the Ministry of Agriculture, the Ministry of Economics and the Tax and Customs Authority" [Section 4(d)(5) of the Procedure].

Exit of goods from the Gaza Strip for sale in the Judea and Samaria Area

10. The transport of goods outside the Gaza Strip for sale in the Judea and Samaria Area, like all other various applications from the Gaza Strip as aforesaid, is also predicated on an

1

<http://www.cogat.mod.gov.il/he/services/Procedure/%D7%A0%D7%95%D7%94%D7%9C%20%D7%99%D7%99%D7%A6%D7%95%D7%90%20%D7%9E%D7%A8%D7%A6%D7%95%D7%A2%D7%AA%20%D7%A2%D7%96%D7%94.pdf>

application being forwarded by the Palestinian Civil Affairs Committee and a security screening, as the underlying rationale for these requirements pertains to the transfer of goods from the Gaza Strip via Israel, and therefore, they also apply to goods transferred from the Gaza Strip for sale in the Judea and Samaria Area.

11. Currently, thousands of tons of goods are transported from Gaza both for export abroad and for sale in the Judea and Samaria Area aboard hundreds of trucks every year. In 2016, 1331 trucks went through the Kerem Shalom Crossing carrying goods for sale in the Judea and Samaria Area and abroad; in 2017, the number stood at 1875 trucks; and in 2018, the number stood at 2433 trucks.

The matter of the Petitioners and their company

12. In a letter dated March 5, 2018 (attached to the **petition** as Exhibit **P/7**) and addressed to the head of the Economic Division at the Gaza CLA, an application was made on behalf of the Petitioners, via counsel, under the caption “Application for Permit to Sell Food Products from the Gaza Strip in the West Bank.” A response dated April 20, 2018, sent by the Gaza CLA public liaison officer (attached to the **petition** as Exhibit **P/8**) noted the application had been received and stated: “be advised that we are working vis-à-vis your clients and Palestinian officials to advance the matter.”

In a letter dated two days later, April 22, 2018 (attached to the **petition** as Exhibit **P/9**) an additional application was made by Petitioners’ counsel regarding the company of Petitioners 1-2 and another company. Said letter received no response, but it should be emphasized that to date – **no official application has been submitted to the Gaza CLA on behalf of the responsible representatives on the Palestinian side in the matter of the Petitioners and their company, as required.** Moreover, a review of the petition seems to indicate that **the Petitioners have not even submitted an application in that regard to Palestinian Civil Affairs Committee officials.** Section 29 of the petition (page 6) states, *inter alia*, that “There is no point in the Petitioners’ applying to any party in the Palestinian Authority without provisional approval from the respondents.”

The position of the State

13. The position of the State, as specified below, is that the petition should be denied.
14. As described above, the premise is that residents of the Gaza Strip, which is controlled by the Hamas terror organization that acts against Israel, do not have a vested right to enter Israel or transport goods to or through its territory.

At the same time, and as described above, under the current policy there is no general prohibition on transporting goods from the Gaza Strip via Israel for the purpose of transporting said goods abroad or to the Judea and Samaria Area. Accordingly, some goods are currently transported from the Gaza Strip via Israel for export abroad or for sale in the Judea and Samaria Area. However, according to the current policy and as prescribed in the Export Procedure described above as well, certain conditions and requirements must be satisfied, including **a requirement for an application in the matter to be forwarded by the Palestinian side (namely, Palestinian Civil Affairs Committee officials);** security screening of goods prior to transport from the Gaza Strip; and food safety requirements.

15. In the case at hand, as aforesaid, **no application in the matter of Petitioners 1-2 and their company has been forwarded by the Palestinian side to date**, and, therefore, the petition should be denied for this reason alone. Furthermore, a review of the petition seems to indicate that **the Petitioners have not even submitted an application in that regard to Palestinian Authority officials**. Section 29 of the petition (page 6) states, *inter alia*, that “There is no point in the Petitioners’ applying to any party in the Palestinian Authority without provisional approval from the respondents.”

In the case of the Petitioners in the petition herein, the basic requirement for considering whether to allow the transport from the Gaza Strip via Israel – namely, receipt of an appropriate application in the matter from the relevant officials at the Palestinian Civil Affairs Committee – has not been satisfied. It is stressed that in this regard, the relationship is an intra-Palestinian relationship, between a Gaza Strip resident wishing to sell goods and the officials of the Palestinian Civil Affairs Committee, to which Israel is not party. As aforesaid, no such application in the matter of the Petitioners and their company has been forwarded. Therefore, the position of the State is that since the prerequisite noted above has not been met, remedies have not been exhausted and **the petition at hand is, in fact, premature and theoretical**. So long as this prerequisite is not satisfied, the process pertaining to the transport of the goods in question from the Gaza Strip cannot continue.

It should also be noted that said demand to have the Palestinian Civil Affairs Committee forward an application as a condition for processing, is a base requirement for applications for the movement of both people and goods from the Gaza Strip. It should also be noted that the Honorable Court has addressed the issue of the requirement to have applications forwarded to the Israeli side through officials on the Palestinian side in its jurisprudence, and found no flaw therein [compare, for instance, H CJ 5429/07 **Physicians for Human Rights – Israel v. Minister of Defense** (June 28, 2007); H CJ 8705/17 **A. v. Minister of Defense** (delivered on November 20, 2017, amended on November 21, 2017); H CJ 10336/06 **Abu Huza v. GOC Southern Command** (December 27, 2006)].

As far as the Israeli side is concerned, therefore, there is nothing to preclude the Petitioners from filing an application with the Palestinian Civil Affairs Committee, as acceptable, and to the extent that said application is thereafter forwarded by the Palestinian side to the Israeli side, it may be examined. As aforesaid, there is no indication that the Petitioners have filed such an application in the first place, and therefore the position of the State is that the petition should be denied and that a costs order should be made against the Petitioners.

16. Beyond requirement, it should also be noted that inasmuch as an application is forwarded by the Palestinian side, it will have to be examined, as acceptable, according to the provisions of the Procedure; subject to possible security screening of the goods; with attention, *inter alia*, to public health considerations, particularly in view of concerns over food originating in the Gaza Strip that is manufactured without sufficient control and regulation potentially crossing into Israel. In that regard, the position of the Ministry of Health is that it is necessary to examine whether assurances can be supplied that the relevant goods are transferred, sealed, from the Gaza Strip directly to their destination (namely, to the Judea and Samaria Area or to the exit point from Israel abroad, as the case may be), to prevent uncontrolled crossing of said food into Israel. It should also be pointed out on behalf of the Ministry of Health, with respect to the possibility of the sale of the

food referred to in the petition in the Judea and Samaria Area, that over time, the possibility of third-party supervision over the manufacture of food products in the Gaza Strip has been examined, including vis-à-vis foreign parties. The matter has been considered given the fact that there is currently no regular or sufficient supervision over the manufacture of the above-referenced food in the Gaza Strip and given its potential for crossing over into Israel from the Judea and Samaria Area. This examination has yet to bear fruit. Therefore, at this stage, difficulties may arise with respect to the transport of the above-referenced goods from the Gaza Strip for sale in the Judea and Samaria Area. In any event, and as stated above, a basic condition for application processing by the Israeli side is that an application is forwarded from the Palestinian side (which in and of itself is an internal matter of the Palestinian side).

17. The facts specified in this response pertaining to the Ministry of Health are supported by the attached affidavit of Mr. Eli Gordon, national Food Service Director.

Military officials advised that the facts specified in this response concerning the Gaza District Liaison Administration (Gaza CLA) will be supported by the affidavit of the head of the Economic Division at the Gaza CLA and that he has read and approved the content of the response. For technical reasons, it was not possible to obtain his signature on the affidavit today. Therefore, permission to file his affidavit within the next few days is hereby requested.

Today, Nisan 10, 5779

April 15, 2019

(Signed)

Yonatan Nadav, Advocate

Senior Deputy at the HCJ Department

State Attorney's Office