

Before: Honorable Justice Y. Tirkel  
Honorably Justice A. Procaccia  
Honorably Justice E. Levy

The Petitioners:           1. Sheikh Ra'ed Salah  
                                  2. Al Meezan Association for Human Rights  
                                  3. Adalah: The Legal Center for Arab Minority Rights in Israel

v.

The Respondent:           Minister of the Interior

Petition for a Temporary Injunction

On behalf of the Petitioners: Hassan Jabareen, Advocate; Orna Kohn, Advocate  
On behalf of the Respondent: Yochi Jensen, Advocate

## JUDGMENT

### Justice Y. Tirkel:

#### Background

1. On 16 February 2002, the Minister of the Interior, the Respondent herein, issued an order prohibiting Petitioner 1 (hereinafter - "the Petitioner") to leave Israel. The text of the order states as follows:

In accordance with my authority under section 6 of the Emergency Regulations (Foreign Travel), - 1948, and having reviewed the recommendation of the General Security Service, reference number M479168/0202, of 15 February 2002, and its appendices, I am convinced that there is a significant likelihood that the exit of Ra'ed Salah Suleiman Mahajni, holder of identity number 0-5520106-5 ("the above-referenced"), from Israel would harm the security of the state. I forbid his exit from the country for a period of six months, from 16 February 2002 to 15 August 2002. I direct that this order be delivered by hand to the above-referenced, and he shall be entitled to set forth his contentions in writing as regards this order.

(The said order will be referred to hereinafter as "the order.")

2. The Petitioner, a clergyman and spiritual leader, and Petitioners 2 and 3, which are NGOs striving to promote human rights, petitioned to cancel the order and enable the Petitioner to leave Israel so that he can "perform his religious commandment, *al 'umra*, on 14 June 2002 in Mecca, Saudi Arabia." The Petitioners also seek a temporary injunction ordering the Minister of the Interior to suspend the validity of the order for the period of 14-30 June 2002.
3. On 10 June 2002, a hearing on the petition was held. During the hearing, we studied, in the presence of counsel for the state only, confidential material that had been presented, and we were provided explanations regarding the material. Following the review and explanations, we informed the Petitioners at the end of the hearing that the Respondent believes there is a fear that the exit of the Petitioner from Israel would be exploited to meet with hostile persons. Counsel for

the Petitioner accepted our suggestion that they raise their objections in a letter to the Minister of the Interior, the Minister respond thereto, after which counsel would notify the Court of the results of this process. In our ruling, we denied the Petitioner's request for a temporary injunction. On 26 June 2002, counsel for the Petitioners submitted a statement indicating that the Minister of the Interior had rejected the objections, and that the Petitioners continue to persist in their petition and their request for a temporary injunction. Attached to the statement was a copy of a letter from the Petitioners' counsel to the Minister of the Interior, to which was attached an affidavit of the Petitioner and the response of the Minister of the Interior. On 7 July 2002, the Respondent replied to the Petitioners' statement.

### **Litigants Arguments**

4. In their petition and in the hearing before us, the Petitioners' argued, in brief, that the order infringes the Petitioner's constitutional right to leave the country, his constitutional right to personal liberty, and his fundamental right to freedom of religion. The Petitioners argued that the Minister of the Interior does not have the authority to issue an order prohibiting exit from Israel for the lengthy period of six months, on the grounds that such an order infringes constitutional rights. They also contended that the Petitioner was not given a proper opportunity to be heard, and the order is, therefore, "void." In their previously mentioned statement of 26 June 2002, they further argued that, "the banal, non-detailed response of the Respondent does not prevail over the detailed affidavit submitted by the Petitioner, in which he declares that he has no intention whatsoever of meeting in Mecca with hostile persons or with any political person." They further argued that, "The grounds raised after the filing of the petition, i.e., 'the fear of meeting with hostile persons' not only is factually inaccurate, it supports the Petitioners' argument that the case does not involve harm to state security that would justify the issuance of such an order, and that it does not reach the level of near complete certainty." As regards the objections raised in the letter, they argued that, "Because constitutional rights are involved, the Minister is obliged to hold a preliminary hearing."

In opposition, the Respondent argued, in brief, that alongside the constitutional rights of the Petitioner lies the public interest for security, order, and public safety. According to the Respondent, there is secret information in the Petitioner's case that indicates "the exit of the Petitioner from the country is liable to severely endanger state security." In his aforementioned response of 7 July 2002, he argued that, as regards offering an opportunity to be heard, under the circumstances, offering the Petitioner the opportunity to be heard by letter was sufficient, and that "it was impossible to present to the Petitioner the factual and intelligence foundation underlying his decision, because of the secret intelligence material involved, which could not be revealed for reasons of state security." "In these circumstances," he continued, "it is clear that it is impossible to grant an opportunity to be heard 'in the normal manner,' insofar it is subject to restrictions resulting from the nature of the material on which the factual foundation that is the subject of the administrative decision is based." The Respondent added that, "regarding the said exit to a foreign, enemy state, as a rule, the Petitioner does not have the right to leave..."

### **The Normative Framework**

5. Article 6 of the Emergency Regulations (Foreign Travel) - 1948 ("the Regulations"), pursuant to which the Respondent prohibited the Petitioner from leaving the country, as stated above, provides as follows: "The Minister of the Interior may prohibit the departure of any person from Israel if there is reason to apprehend that this departure may impair the security of the state."
6. Questions comparable to those raised in the petition before us were raised initially, I believe, in the Supreme Court some fifty years ago. At that time, a person was not allowed to leave Israel for abroad unless he had an exit permit from the Minister of the Interior, as stated in the annex to the Order Extending the Validity of the Emergency Regulations (Foreign Travel) - 1948. In our matter, appropriate are the comments of Justice M. Zilberg at the beginning of the judgment in the

petition against the decision of the Minister of the Interior not to permit the petitioner to leave the country:

Before us is the extremely important question that affects, or is liable to affect, the security of the state, on the one hand, and freedom of movement of the citizen, on the other hand. The question is not which of them is given priority. Clearly and unquestionably, and it is not necessary to dwell on this point, matters of state security precede everything, and even the fear - the frank and earnest fear - of harm in these matters is liable to push aside every other consideration, whatever its weight. The question is only whether the respondents herein, who base their refusal on banal "security reasons" met their obligation under the order that was directed toward them by this court, and whether "they showed reason" not to grant the applicant the requested exit permit.

(HCJ 111/53, *Kaufman v. Minister of the Interior*, P.D. 7 534 ("*Kaufman*"), p. 536.

It was further stated in *Kaufman* that:

*The citizen's freedom to move from the country to abroad is a natural, recognized, automatic right in every democratic state - and our country is one of them - and the citizen does not require any special qualification to be granted this freedom. The entire significance of a permit - if such could be said - is not "positive;" rather, it is "negative." It declares: we, the competent authorities, do not oppose you, citizen X, from leaving the country as you wish, as if to say, we have not found grounds for prohibiting you from doing this. Therefore, there must be a foundation and reason why the citizen is prohibited, and not why he would be permitted to leave the country, for it is impossible to explain the lack of grounds.*

*Kaufman*, pp. 536-537 (my emphasis, Y.T.).

In the same matter, the Court dismissed the petition after it found that the Minister of the Interior's refusal to issue the exit permit was based on security reasons, which could not be revealed. As we shall see below, the reasons continue to apply today.

7. In deciding whether to issue an order prohibiting a person to leave Israel, the Minister of the Interior faces the conflicting issues of the right of the individual to freedom of movement and the duty to protect state security. The test employed for balancing between the two was discussed at length in the judgment given in HCJ 448/85, *Kamal Daher, Advocate v. Minister of the Interior*, P.D. 40 ("*Daher*"), which involved a petition against the decision of the Minister of the Interior, issued in accordance with Article 6 of the Regulations, to prohibit a person from leaving the country. The Court adopted the "frank and earnest fear" test, on which the court stated:

Regarding the freedom of movement outside the boundaries of the state, I accept (as stated) the "frank and earnest fear" test. When applying the test, we must balance the need to safeguard the relevant rights - while it is less important than the right of movement within the country, it is still important - on the one hand, with the need to prevent acts that endanger state security, if the freedom of movement is not restricted on the other hand. There must, therefore, be a causal connection between the two (as explained above), furthermore, we should consider the level of severity of the "frank and earnest fear" which is apparent because the fear for state security can take various forms and be expressed in different ways at varying levels of severity. A slight danger or a danger that is relatively light is not the same as a danger that relates to the meaningful vital interest.

Comments of Justice M. Ben Porat and Justice A. Goldberg in *Daher*, at pages 709 and 719, respectively.

See also *Kaufman*.

Alongside these comments, an opinion has also been expressed that assists the person who was prohibited from leaving the country, whereby "the 'earnest' fear justifying issuance of the order prohibiting a person from leaving the county must be based on the assessment that a *meaningful danger* exists, that the person's travel abroad is liable to cause *significant damage* to state security" (my emphasis - Y.T.) (comments of Justice G. Bach in *Daher*, at p. 717). Also mentioned in the judgment are other tests for balancing between rights, such as between the freedom of speech and state security: "clear and present danger," "near certain danger to public safety," and "near certainty" (see, *inter alia*, HCJ 73/53, *Kol Ha'am v. Minister of the Interior*, P.D. 7 871; HCJ 2481/93, *Dayan v. Wilk*, P.D. 48 (2) 456 ("*Wilk*"); Avner Barak, "The Test of Near Certainty in the Law," *14 Hebrew University Law Review* (1989) 371 (Hebrew).

Ultimately, this petition, too, was denied. The Court was convinced that, based on the secret material, there was no place to interfere with the decision of the Minister of the Interior (on the prohibition on exiting Israel to go to an enemy country, issued in accordance with Article 5 of the Regulations, see and compare: HCJ 658/80, *Taha, et. al. v. Minister of the Interior*, P.D. 35 (1) 249; HCJ 386/85, *Bdir v. Yosef Tov*, P.D. 39 (3) 54.

8. After the judgments were given in these cases, the Knesset enacted the Basic Law: Human Dignity and Liberty (1992) ("the Basic Law"), which provides, in Article 6(a), "All persons are free to leave Israel."

As stated in the Basic Law, the rights set forth therein may be violated only in accordance with the limitation provisions set forth in Article 8. Also, pursuant to Article 10 of the Basic Law, the Basic Law does not affect the validity of any law in force prior to its enactment; however, the Basic Law influences their interpretation. As regards the prohibition on a defendant to leave the country, it was stated:

... even though the Basic Law does not affect the validity of section 44 [of the Criminal Procedure Law (1982)], it affects its interpretation. The provisions of the law, whose validity was preserved, should be interpreted in the spirit of the Basic Law.... Therefore, when the court exercises its authority and orders the prohibition on leaving the country, it must give substantial weight to the right of the defendant to leave Israel. *This right is not absolute. It is relative. It may be limited for reasons of the public good.*"

Comments of Chief Justice A. Barak in C.M. 6654/93, *Binkin v. State of Israel*, P.D. 38 (1) 290 (my emphasis - Y.T.) ("*Binkin*").

See also: C.M. 1986/94, *State of Israel v. Amar*, P.D. 38 (3) 133.

In the matter of prohibiting exit to an enemy county, issued pursuant to Article 5 of the Regulations:

In exercising their discretion on this subject in a specific case, the respondents should not and are not able to ignore the fact that the right of a citizen to leave Israel to go abroad has now also been given the validity of a Basic Law...

HCJ 3290/94, *HaMoked: Center for the Defence of the Individual, et. al. v. Minister of the Interior, et. al.*, (not yet published) ("*HaMoked*").

In the matter of stay of exit order of a debtor from the State in an Executions Office proceeding, it was stated as follows:

Indeed, the right to leave the country, which is part of the freedom of movement, has become with the enactment of the Basic Law a right of constitutional normative status, a paramount law. *Therefore, the weight of this right and of the considerations embodied therein, has increased in Israeli law in comparison with the period preceding enactment of the Basic Law.* The increased importance of freedom of movement and leaving the country is expressed in the interpretation of the legislation granting powers to issue stay of exit orders from Israel.

Comments of Justice T. Or in M.A.P. 7208/93, *Weissglass v. Weissglass* (not yet published) [sic] (my emphasis - Y.T.).

It should be noted that the question of the degree that the Basic Law affects the interpretation of Article 6 of the Regulations, and the balance between the right of the individual to freedom of movement and the protection of state security has not yet been ruled on by the courts.

### **The Right to Leave Israel and State Security - the Proper Balance**

9. Indeed, the right of a person to leave and return to the country in which he lives is a "natural right." It is one of the fundamental human rights. Restriction of the right gravely infringes the individual's rights (see, *inter alia*, *Kaufman; Daher*, at p. 712 and the references mentioned there; *Binkin; HaMoked*). As stated above, the right to leave Israel is enshrined in section 6 of the Basic Law; however, it may also be viewed as derived from the right to freedom of movement and from the right to liberty. It was stated:

A person who rebels against any restriction on his freedom of movement in practice is demanding that the right in principle to freedom of movement also be granted to him; he claims the general right to freedom of movement. In contrast, a person who seeks to remove the restriction that prevents him from entering a certain place requests a specific freedom of movement, as is the case with a person who wishes to be allowed to leave the country. Note well: a specific right does not have to relate to one specific object, but can also relate to a specific group of objects, distinct from objects that are not within the said group. For example, a person who demands that he be granted the right to leave the country is seeking a specific right to freedom of movement for himself, while the exercise of the right is also liable to be expressed in travel to several countries. The aggregate total of the foreign countries to which he may wish to travel constitutes possible objectives for exercising his specific right. Travel to other places that are located within the boundaries of the state, while they, too, constitute possible objects for the exercise the right to freedom of movement, are not objects for exercising the specific right to leave the country. Contrarily, as regards a person who seeks to be released from detention, or from another restriction placed on his freedom of movement, such that he can travel to certain places within the borders of the state, only the places to which he wishes to travel would constitute objects for the exercise of his specific right to freedom of movement within the state.

Comments of Chief Justice A. Barak in Civ. Rehear. 2401/95, *Nahmani v. Nahmani*, P.D. 50 (4) 661, 749.

However, the right to leave Israel is not absolute; it has a relative quality. It may be restricted in the face of other significant considerations. The right to leave the country is important and precious, but can be restricted to fulfill the duty - also important and precious - to protect state security and public safety. In this sense, it is comparable to the freedom of speech, where the public interest in security, order, and safety limit it,

provided there is 'near certainty' that actual damage will be caused to the public interest if freedom of speech is not restricted - similarly, the public interest in security prevails over

the freedom of movement outside the borders of the state, provided there is a 'frank and earnest fear' of harm to security...

Comments of Deputy Chief Justice (as his title was at the time) A. Barak in *Wilk*, p. 475.

How is the individual's right to leave Israel - which is, as mentioned, derived from the right to freedom of movement and the right to liberty - weighed against the public's right to security? Where is the proper balancing point? When we place the conflicting rights on the scale, I believe that, first of all, it is necessary to weigh the magnitude of the infringement of the individual's right, and then the magnitude of the harm to the public's right. The magnitude of the infringement of the individual's right is examined in accordance with the geographical scope of the restriction, the period that the restriction is in force, and also the personal interest of the person who is not allowed to leave the country.

10. Regarding the geographical scope of the right: it goes without saying that the gravest infringement of the freedom of movement and the right to liberty is the incarceration of a person in prison, pursuant to an arrest or detention order, and restricting his movement within the confines of the prison. A lesser infringement is the restriction on freedom of movement from a certain place of residence, such as substituting detention that conditions the defendant's release on his staying at a certain address ("house arrest"). A lesser infringement is the restriction on movement to a certain town; and lesser than that, restriction on movement by prohibiting entry into a certain town. Lesser than that, infringement of the right of movement by forbidding exit from the country, such as by Article 6 of the Regulations, or forbidding a defendant to leave, or a debtor to leave. Lesser than that, restriction by prohibiting entry into a certain country, such as prohibiting entry into an enemy country pursuant to Article 5 of the Regulations (in the latter matter, see HCJ 488/83, 496/83, 505/83, *Bransi v. Director of Visas Department, et. al.*, P.D. 37 (3) 722).

When these limitations encounter certain security objectives, it is said that:

Limitation orders can be varying and diverse, and the degree of harm they cause is not the same for every person. This is not true of a limitation order imposing a restriction of "house arrest" on an individual (Article 110(4) of the said regulations [Emergency Regulations (1945)]), as a limitation order restricting the individual's movement to an area within which he is free to move about as he wishes. A restriction to a certain area imposed on a person who lives and works in that area is not the same as a limitation on a person who is "exiled" to the area pursuant to the order. In the same way, a person who is forbidden to leave the country is not the same as where a person's freedom of movement is limited to the confines of the state (HCJ 448/85). However, every measure of infringement of the freedom of movement must be the result of facing the two values against each other, and being convinced that the infringement is indeed necessary to achieve the specific security objective that it was intended to prevent.

Comments of Justice A. Goldberg in HCJ 672/87, *Athamleh v. Commanding Officer, Northern Command*, P.D. 42 (4) 708, 710.

See also *Daher*, at p. 708 and the references cited there, and at p. 714.

As stated, regarding the magnitude of the infringement of a right - or the "proportionality" of the infringement - it is also necessary to weight the period of time of the restriction. The longer the restriction continues, the greater the magnitude of the restriction. A restriction on the right to leave the country that lasts for several days is not the same as a restriction lasting several months or years (I. Zilbershatz, "The Right to Leave a State," 23 *Hebrew University Law Review* (1994) 69, 89. (Hebrew))

We stated that it is also necessary to weigh the personal interest of the person who is forbidden to leave the country. The purpose of the travel and its destination are important considerations in measuring the magnitude of the infringement of the right. Limiting the right to exit of a person for whom leaving is necessary and important is liable to increase the magnitude of the infringement. A restriction placed on a person whose leaving is intended, for example, to receive medical treatment is not the same as a restriction placed on a person whose leaving is intended for a vacation trip. Furthermore, limiting a person from leaving the country when he seeks to make a pilgrimage to a holy site of his religion infringes his right to freedom of religion and his right to practice his religious ceremonial rites, and as such is an extremely grave infringement (Zilbershatz, at p. 88.)

11. The case before us involves an order prohibiting the Petitioner from leaving the country. As we have seen, this restriction is not among the gravest of infringements of liberty or freedom of movement. The prohibition is given for the period of six months. This is not a short period, but it is not a limitation that is impossible to withstand. Even where the purpose of leaving is to perform the religious commandment of *al 'Umra* in Mecca, Saudi Arabia, on whose importance the Qadi Ahmad Natur, president of the Shari'a Appellate Court said, in his opinion of 30 May 2002, that, "It is the duty of every able adult..." All of these factors must be weighed against the security reasons that weigh against the Petitioner's leaving the country. It should also be recalled that the Petitioner seeks to leave Israel to go to Saudi Arabia, an enemy state for which a permit pursuant to Article 5 of the Regulations is required to leave the country to visit there (although the Minister of the Interior in fact prohibited the exit of the Petitioner pursuant to Article 6). Tangential to these considerations it should be mentioned that the order was given, as stated, on 16 February 2002 for a period of six months, which is scheduled to expire on 15 August 2002.

In deciding between the conflicting considerations, it seems to me that the "frank and earnest fear" test referred to in *Kaufman* and adopted in *Daher* continues to apply after enactment of the Basic Law. This test is enshrined in the text of section 6 of the Regulations, pursuant to which the Minister of the Interior may issue an order prohibiting a person to leave Israel, and "a *basis for the fear* that his leaving is liable to harm state security" is sufficient (my emphasis - Y.T.). Indeed, the right to leave the country, which has always been recognized as a fundamental human right, is also enshrined in Article 6(a) of the Basic Law; unfortunately, however, the danger to state security and public safety have not dissipated and have not diminished, and assumedly have even increased during the current period. We have said that the right to leave the country, like every human right, is relative and not absolute. In balancing it against security considerations, it is necessary to take into account the grave dangers to state security and public safety - and also the lives of members of the public! - during the period in which we live. In any event, even if we apply one of the tests that are more favorable to a person whose exit from the country is prohibited than the test mentioned, investigation of the secret material submitted in our case leads me to believe that there is a "frank and earnest fear" - and maybe even "near certainty" - that the Petitioner's exit from Israel is liable to gravely endanger state security.

Tangentially, it should be noted that, as regards the purpose and objective of the Petitioner's travel, according to the opinion of Qadi A. Natur, there is no duty to perform the commandment of *al 'Umra* at a specific time of the year (except for a number of days on the calendar in which it is not desirable to perform it). Thus, after the period of the prohibition on leaving Israel expires - in another month or so - the reason for performing the commandment will continue to be valid.

### **The Right to be Heard**

12. The Petitioners argued that the Petitioner was not "completely" provided the right to be heard. It is unnecessary to expand on the importance of the right to be heard - which is a principle of natural justice - particularly when the proceeding infringes a fundamental right. On this point it was said that, "A fundamental right of a person in Israel is that a public agency that impairs the status of an individual will not do so without granting the said individual the opportunity to state his case"

(comments of Justice A. Barak in H CJ 654/78, *Gingold v. National Labor Court*, P.D. 35 (2) 649, 655; see also H CJ 3/58, *Berman v. Minister of the Interior*, P.D. 12 (3) 1493, 1505-1508; H CJ 358/88, *The Association for Civil Rights in Israel v. Commanding Officer, Central Command*, P.D. 43 (2) 529, 540; Y. Zamir, *Administrative Authority* (vol. 2, 1996) 793 ff.; and compare my comments in Civ. App. 530/78, *Mipromal Ltd. v. Director of Customs*, P.D. 35 (2) 169.

I shall add here the comments made regarding the difficulty in exercising the right to be heard in cases of prohibiting exit from Israel for security reasons:

Before us is a woman whose freedom of movement was restricted by a decision given in banal language that the refusal was for "security reasons," without revealing to her and the court the nature of these security reasons. The applicant was also denied in effect the opportunity for judicial review because the arguments of the opposing side could be refuted only when they were known; *it is impossible to argue with a sphinx*.

Comments of Justice M. Landau in *Kaufman*, at p. 541, (my emphasis - Y.T.).

However, "Hearings may be conducted in many and diverse ways, which change according to the circumstances. Being heard can be done in writing and it can be done orally. When it is done orally, it can be done with the entire group and in the presence of everyone involved, and it can be done in stages, with each side being heard in turn" (H CJ 161/84, *Windmill Hotel Company Ltd. v. Minister of the Interior*, P.D. 42 (1) 793, 796; and on the matter of prohibiting exit from Israel, see *HaMoked*). Moreover, in certain circumstances, the hearing may be conducted after the administrative authority made its decision (Zamir, at pp. 824-827).

I compared these principles, and I am satisfied that, when the Petitioner was given a proper opportunity to make his objections to the Minister of the Interior as regards the fear that his leaving the country would be exploited to meet with hostile persons, and the Respondent responded to the objections, the Petitioner's right to be heard was thoroughly exercised, even though the hearing took place in writing and even though it occurred after the order had been given. Therefore, the Respondent fulfilled his duty.

### **Epilogue**

13. It has been shown that the security reasons outweigh the right of the Petitioner to leave Israel. I suggest, therefore, that we dismiss the petition of the Petitioner and that the order prohibiting him from leaving Israel remain in effect.

### **Justice A. Procaccia:**

I consent.

### **Justice E. Levy:**

I consent.

It is decided as stated in the judgment of Justice Y. Tirkel.

Given today, 17 July 2002

s/  
Justice

s/  
Justice

s/  
Justice