Unofficial translation by NGO Monitor (17 August 2016)

Original Hebrew (2007): http://elyon1.court.gov.il/files/07/820/051/T02/07051820.t02.pdf

In the Supreme Court sitting as the High Court of Justice

Case #5182/07

Before: The Honorable E. A. Levy

fThe Honorable E. Rubenstein

The Honorable Y. Alon

The Petitioner: Shawan Rateb Abdallah Jabarin

Versus

The Respondent: Commander of IDF Forces in the West Bank

Petition for a Conditional Order

Representing the Petitioner: Michal Sfard Esq.

Representing the Respondent: Itai Ravid Esq.

Decision:

Judge E. Rubinstein

A (1): The petitioner asks to remove the prohibition [enacted by] the IDF commander in the West Bank to travel abroad from Judea and Samaria, specifically to go to an international conference on peace and justice, that will be held in Germany between the 25th and 27th of this month.

(2) The petition claim that the petitioner is a prominent human rights activist in the West Bank, and by limiting his movement there is "an unpleasant odor of harassment of a man active in solidifying the human rights of his people," and harms the petitioner's freedom of movement.

(3) It also claimed that the "Al Haq" organization- of which the petitioner has served as CEO since 2006- is the oldest Palestinian human rights organization and cooperates with international and Israeli organizations. Previously – 2004 – the petitioner asked to exit from the West Bank for advanced studies and was denied, and following a petition to this court his request was accepted, on the condition that that he agree not to return to the area for a year and will not act against the security of the area and of Israel. Additionally is has been said that between 1999-2006, the petitioner went abroad on 8 different occasions- the last in February 2006- on some of whom he was required to sign a declaration that he will not engage in "terror activity" while abroad. However, since March 2006, the petitioners exit has been obstructed without any procedure against him. On 23/03/2006, his exit to Jordan was

denied at the Allenby Bridge and afterward he was asked to meet a Shabak representative, where an incident occurred as a result of which the authorities kept his ID for three months. In October 2006, his exit to a conference in Spain was denied, with the justification being his activity in the PFLP [Popular Front for the Liberation of Palestine]. In November 2006, he was invited to a conference and appealed the restriction on his travel to this court, however, in a discussion where the court studied the classified material with only one side present, the petition was denied (HCJ 9703/06, was not published). It was claimed that a number of human rights NGOs petitioned in favor of the petitioner and a number of those petitions were attached. Also, on 1/05/2007 the petitioner requested to travel to a conference in Germany (and afterword requested to travel to preparatory meetings in Switzerland), the answer was delayed – and therefore the petition was submitted.

(4) In the legal sense a broad presentation was made. It was claimed that in limiting one's freedom to exit [the country] without a hearing or the ability to appeal, legal principles are violated as are natural principles of justice. It has been argued that freedom of movement exists both under the law of occupation as well as international humanitarian law, even more so when applied to human rights defenders, which international law provides more protection to. Furthermore, Israeli constitutional law has anchored the freedom of movement in the paragraph 6(a) of Basic Law: Human Dignity and Freedom. Disproportionality has also been argued.

B. The military commander has replied that the objections by security forces are all rooted in security concerns based on classified information, showing that the petitioner is a senior activist in the PFLP terror group, and that allowing him to travel abroad my further the group's activities. It has also been argued that according to security-related laws, the area [of the border crossing] is a closed military zone, with entry and exit allowed according to the military commander's decision. Security concerns are a mainstay of this decision. According to recent intelligence information held by security forces, it has been argued that allowing the petitioner to exit will pose a threat to the state and to the public.

C. (1) Firstly, the petitioner's lawyer has argued that the violation of the basic right to leave the country is not regulated through any process and presenting a "closed military areas" warrant (West Bank area (no. 34) 1967) is not sufficient. Administrative detention has a formal process and so should this process, especially with regards to a director of a human rights group; letters from human rights organizations indicate that this is a person who genuinely works to promote human rights, not as a cover for other activities. The petitioner vociferously denies any affiliation to terrorist groups or to terrorist activities, and the NGO "Al-Haq" has also criticized the Palestinian Authority, possibly leading the PA to seek to hinder his exiting the country. The burden of proof should be on the state to prove that there is a reason to hinder his freedom of movement, and the correct balance should take into consideration whether this trip abroad is connected with terrorist acts. When there is public as well as personal necessity the need for balance is even greater. A director of a human rights group has a special status similar to that of journalists or humanitarian workers; the security concerns must be concrete to justify hindering his freedom of movement.

(2) The State Attorney has argued that the previous petition was rejected six months ago on a similar basis and that this path was already well-travelled. There is a concern on the part of the state that allowing the petitioner to exit will promote the activities of the PFLP terrorist organization. As to the claim regarding non-existence of a process, it has been argued that the area [of the border crossing] is a closed military zone - with all of the associated ramifications- and that is the basic situation; however it is possible to have a written appeal from the petitioner. The justification for denying the petition was his resumption of terrorist activity after returning to the country.

D. (1): With the agreement of the petitioner's representative, we have studied the classified material in camera, and we have engaged in a debate about it with the representatives of the Ministry of Defense. We were convinced that there is a real basis to the claim of the respondent about the activity of the petitioner in the PFLP organization, according to current information. Therefore, as it stands for this requested trip, we do not think that there is a place to intervene in the decision of the respondent not to allow the petitioner to leave the country, due to a concern that the trip will be used for non-human rights activity, but rather the opposite. There is therefore no other choice but to not accept the petition.

(2) The Court saw fit to add the following: Yes, we would have wanted to be in a situation in which we can often lend our hand to all of the human rights organizations, in which the activities of all of their employees will be above all suspicion, in light of the principals in whose name they operate, and we hope that that is generally true. This court, when considering human rights, will find very often find itself on the side which is asking to uphold them and to balance them with security considerations, carefully weighing the issues, with respect and sensitivity to the question of rights.

We have studied the classified material regarding the petitioner with an open mind, in a manner of quasi-defense-attorney, despite the fact that only half a year ago - 10.12.06 - a request of the petitioner to leave the country was denied under the same reasons.

Nevertheless, the current petitioner is apparently acting as a manner of Doctor Jekyll and Mister Hyde, acting some of the time as the CEO of a human rights organization, and at other times as an activist in a terror organization which has not shied away from murder and attempted murder, which have nothing to do with rights; rather, they violate the most basic right of them all, the most fundamental right that without which there are no other rights - the right to life. Yes, the representative of the petitioner denied any involvement of his client in terror, and often the attorney does not know what his client knows, and so too, ACRI [Association for Civil Rights in Israel] whose CEO petitioned the Minister of Defense on behalf of the petitioner. Unfortunately, this is not the case. There is indeed a great difficulty that this court has encountered more than once, regarding the classified information that is not presented to the concerned party (see appeal 8788/03 Federman V. Minister of Defense, HCJ 5555/05 Federman V. OC Central Command). However, as expressed in HCJ 5555/05 (p. 869), in the context of combatting terrorism, at a

time when the security services are acting in accordance with the law, while its hands are tied by multiple positive knots that protect human rights (see Chief Justice Barak in HCJ 5100/94 The Public Committee Against Torture in Israel V. Government of Israel) “classified information that is not presented to the concerned parties is a necessary but reprehensible tool… the use of which obviously applies an enhanced requirement… the review the information that is presented to them [the court] as they act as a mouth for those for whom the information has been classified.” Therefore, our decision is based on the classified information, while knowing that there will be human rights activists who will criticize is; however there is no choice and we have been convinced that there is no basis for the petitioner’s denials [of this information].

(2) The petitioner’s representative made extensive and broad legal arguments. We too are of the opinion that there is a place for orderly procedures, that responses to petitions should be given by the relevant authorities in as reasonable amount of time as possible and on the face of things, an individual for whom a decision has been made to deny their exit [from the country] should receive advance notice so that they can consider their legal options. We do not establish hard and fast rules because we have not heard all of the respondent’s answers on this point, partially in light of the urgency of ruling on the petition. We have noted the respondent’s position regarding a hearing. Despite the fact that it is in relation to terror suspects, on the face of things there is room for an appeal of a rejection that is not in the form of turning to this court.

Part of the security legislation, which is 40 years old, was written years ago, and as long as we have not reached utopia, there should be regular consideration of what can be improved.

We add that as a result of the central role of the petitioner in a human rights organization, allegations of terrorist activities on his part, it is worth considering whether these allegations should be handled by an appropriate investigation. However, these have not been considered fully in the context of the petition and we will not establish hard and fast rules in regards to them.

(3) As we have said, we cannot acquiesce to the petition.