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LAA 7216/18

Alqasem v. Ministry of the Interior and The Hebrew University

Decided: October 18, 2018

ABSTRACT

Facts:

This was a request for leave to appeal the judgment of the Tel Aviv-Jaffa District Court sitting as an Administrative Affairs Court denying the Petitioner's appeal against the judgment of the Tel Aviv Appeals Tribunal that denied the her appeal of the decision of the Minister of the Interior to cancel the her visa and prevent her entrance into Israel due to her activities in support of boycotting the State of Israel.

The Petitioner had recently completed her studies toward a B.A. at the University of Florida and was accepted into a graduate program in human rights and transitional justice by the Faculty of Law of The Hebrew University of Jerusalem, for which she was also awarded a scholarship. The Petitioner, who had recently visited Israel as a tourist, was granted a one-year student visa by the Israeli Consulate in Miami. The Petitioner arrived at Ben Gurion Airport at the beginning of the school year, but following questioning at the airport – and after the representatives of the Department of Strategic Affairs and Information of the Ministry of the Interior found that the Petitioner had been involved in activities in support of a boycott of the State of Israel – the Minister of Interior decided to prevent her entry.

In her appeal before the Appeals Tribunal, the Petitioner argued that she had not been a member of Students for Justice in Palestine since April 2017, and that even during her tenure as president of the organization, she had not been involved in any real way in BDS (Boycott, Divestment and Sanctions) activity. She further declared that the did not presently support the boycott movement, and undertook not to call for a boycott or take part in BDS activity during her stay in Israel. The Tribunal ordered the Ministry to reconsider its decision, and to consider a letter from the Rector of the Hebrew University that argued that the decision might inflict serious harm upon the efforts of Israeli academia to promote its academic image in the world. The Ministry reaffirmed its decision. The Tribunal denied the appeal, holding that it had not been shown that the decision deviated from the margin of reasonableness to an extent that would justify intervention, inasmuch as the Minister of Interior enjoys broad discretion in regard to entry into Israel, and inasmuch as no arguments had been made in regard to the status of sec. 2(d) of the Entry into Israel Law, 5712-1952 (hereinafter: the Entry Law) and the tests that had been established in that regard.

The Petitioner's appeal to the District Court was denied. The District Court held that in view of the fear that the Petitioner might exploit her stay in Israel to promote the imposition of a boycott,

the discretion of the Minister of the Interior, as exercised, was consistent with the purposes of sec. 2(d).

Held:

Justice N. Hendel:

This request for leave to appeal raises fundamental questions in regard to the nature and scope of the Minister of Interior's discretion to prevent the entry of a person if he, or the organization or body on behalf of which he acts, knowingly published a public call for imposing a boycott on the State of Israel. It raises, for example, the question of the relationship between the Minister's general authority under sec. 2(a) and his authority under the specific arrangement in sec. 2(d), and whether the Minister's authority is limited to persons currently active, or extends to those active in the past.

Section 2(a) of the Entry Law states:

The Minister of the Interior may grant:

(1) a visa and permit of transitory residence, up to 5 days;

(2) a visa and visitor's permit of residence, up to 3 months;

(3) a visa and permit of temporary residence, up to 3 years;

(4) a visa and permit of permanent residence;

(5) a permit of temporary residence for a person present in Israel without a residence permit who has been issued a deportation order, until his exit from Israel or his deportation therefrom.

The Entry Law and regulations do not establish criteria for granting a permit, and leave the Minister broad discretion. However, the Minister may only take account of considerations that are consistent with the purposes of the Entry Law, and the exercise of his authority is subject to the accepted standards of review of administrative law.

Sections 2(d) and 2(e) state:

> (d) A visa or residence permit of any kind will not be granted to a person who does not hold Israeli citizenship or a permit for permanent residence in Israel if he, or the organization or body on behalf of which he acts, knowingly published a public call for imposing a boycott on the State of Israel, as defined in the Prevention of Harm to the State of Israel by means of Boycott Law, 5711-2011, or has undertaken to participate in a boycott as aforesaid.

> (e) Notwithstanding the aforesaid in subsection (d), the Minister of Interior may grant a visa and residence permit as stated in that subsection for special reasons stated in writing.

Both sides agree that the arrangement is preventative and not punitive. The rationale of the Law, as stated in its Explanatory Notes and in the plenum debate emphasizes the fight against the boycott movement and the desire to prevent its activists from exploiting their stay in Israel. The concrete purpose of sec. 2(d) is to serve the state's just fight against the boycott movement, in reliance upon the defensive democracy doctrine and the state's right to defend itself and its citizens against discrimination (see, e.g., paras. 29-34 of HCJ 5239/11 *Avneri v. Knesset* http://versa.cardozo.yu.edu/opinions/avneri-v-knesset, *per* H. Melcer, D.P.). As stated in the *Avneri* case: "Thus, a call for boycott falls within the category referred to in constitutional literature as 'the democratic paradox', in which it is *permissible* to limit the rights of those who seek to benefit from democracy in order to harm it" (para. 30).

In view of the purposes the Law, the authority to deny entry is clearly restricted to persons who threaten Israeli democracy and seek to subjugate it by means of a coercive, aggressive boycott. That is also reflected in the criteria established for denying entry of boycott activists, which state that the authority under sec. 2(d) will be exercised only against activists of organizations who "actively, continually and persistently" support boycotts against Israel, or "independent" activists who act persistently and prominently to promote boycotts, and who meet one of the following criteria:

> *Holders of senior or significant positions in organizations* – serving senior, official positions in prominent organizations (such as, chair or board members). The definition of positions is subject to change in accordance with the character of each organization.
>
> *Central activists* – persons involved in real, consistent and continuing activity to promote boycotts in the framework of prominent delegitimization organizations or independently.
>
> *Institutional actors (such as mayors) who promote boycotts* actively and continuingly.
>
> *"Actors on behalf"* – activists who arrive in Israel on behalf of one of the prominent delegitimization organizations. For example, an activist who arrives as a participant in a delegation of a prominent delegitimization organization [emphasis original].

These criteria show that even the ministers responsible for implementing the arrangement in secs. 2(d) and (e) are of the opinion that it is applicable only to activists who consistently and continuingly act to promote the boycott. Therefore, a severance between the activist and the organization, or a disruption in the activist's activity may remove him from the scope of this arrangement.

Therefore, the arrangement adopted by the legislature directs the Minister of Interior to close the gates before prominent activists who seek to exploit the state as a base of current activity, unless there are special reasons for permitting entry. However, the arrangement does not apply to persons who were formerly active in boycott organizations who clearly and persuasively show that they have ceased such activity and are not likely to exploit their presence in Israel in order to undermine it.

It should be noted that no arguments were made against the constitutionality of the authority of the Minister of Interior to deny visas to boycott activists – a matter that is pending before the High Court of Justice in HCJ 3965/17. The assumption is that the Law and the criteria are in force, and we are concerned with whether the evidence before the Minister sufficed to justify his decision. The answer to that is no.

The most salient fact before the Court is the Petitioner's desire to find a place in Israeli academia. This was not a hasty decision, but rather the culmination of a lengthy process initiated by the Petitioner. It began with seminars at the Center for Jewish Studies at the University of Florida that included Holocaust studies, and her acquaintance with lecturers who had studied at the Hebrew University and who recommended her. She applied to study at the Hebrew University, and was awarded a scholarship. She applied for a student visa and arrived in Israel just prior to the beginning of the school year. Despite the obstacles placed in her path, she insists upon her right to study at the Hebrew University. Her conduct is not consistent with the view that she is an undercover boycott activist who might exploit her presence in the state to promote the BDS movement. The term "boycott" is defined in sec. 1 of the Boycott Law as "deliberately refraining from economic, cultural or academic ties with another person or body solely because of its connection with the State of Israel" – i.e., the opposite of the Petitioner's conduct.

The Ministry of Interior admits that it has no evidence of boycott activity by the Petitioner since April 2017. In principle, the absence of current BDS activity does not absolutely deny the Minister's authority to refuse entry to boycott activists. However, in view of the significant time that has elapsed since participating in such activity, and the Petitioner's relatively minor involvement, her decision to study in Israel is sufficient to tip the scales and refute the fear of exploitation of her presence in Israel.

Justice Hendel then described the Petitioner's past participation in boycott activities, and went on to note the opinions of her instructors, inter alia, the opinion of Prof. Eric Kligerman of the Center for Jewish Studies, according to which: "Far from being an advocate of BDS or a proponent of suppressing dialogue and the intellectual exchange between peoples, Lara is one of the most engaging and thoughtful students I have had in my seminars on Jewish culture and thought." Justice Hendel concluded that the data, taken as a whole, was not consistent with the argument that preventing the Petitioner's entry would serve the purposes of the Entry Law.

The Minister's decision revoked a visa that had already been granted, as opposed to refusing to grant one. While the difference is not significant in view of the Minister's discretion to cancel a visa under sec. 11(a)(1) of the Entry Law, there is, nevertheless, some weight to the Petitioner's actual reliance upon the visa. This would not itself be sufficient were it not for her conduct since April 2017. But given that, the reliance consideration is significant under the circumstances.

In the present case, preventing the Petitioner's entry does not advance the purpose of the Law. Fighting against the boycott is desirable and necessary, as are the steps adopted by the state in that regard. But the concrete act in the matter before the Court clearly deviates from the margin of reasonableness, and is unacceptable.

Justice A. Baron (concurring):

Freedom of expression, like any other constitutional right, is not absolute and can be limited. In sec. 2(d), the legislature established a balance between the right of the State of Israel to defend itself against a boycott and the principle of freedom of expression. While the authority of the Minister of Interior in the matter of entry into Israel is broad, sec. 2(d) establishes the criteria for the exercise of that discretion in regard to preventing the entry of a person due to calling for a boycott or undertaking to participate in a boycott. Those criteria are the also the basis for judicial review of the exercise of that discretion.

The language of sec. 2(d) clearly treats of the present. Its plain meaning is that denial of entry applies to those who (presently) act to impose a boycott; is (presently) a member of a body or organization calling for a boycott; or has undertaken to take part in such a boycott. This interpretation is also clear from the criteria for refusing entry published by the Respondent in July 2017.

The Petitioner has not been a member of an organization promoting a boycott since April 2017, and there is no claim that she acted in any way to boycott Israel over the last year and a half. The Petitioner also declared before the Tribunal that she would not take part in calls for boycott while in Israel, and her attorney repeated that undertaking before the Court. Under the circumstances, and in accordance with the criteria established in sec. 2(d), there was no foundation for revoking the Petitioner's visa, as she clearly is not currently involved in boycott activity and has not been for some time, and is certainly not involved in activity that is "active", "continuing" and "substantial". The Minister's decision is therefore unreasonable to a degree that justifies this Court's intervention.

It should be noted that since the Petitioner's *actions* are insufficient to deny her entry, the unavoidable impression is that she was denied entry for her *political opinions*. If that is, indeed, the case, then we are concerned with an extremely dangerous act that could lead to the undermining of the pillars that support Israeli democracy. That is not the purpose of sec. 2(d).

Justice U. Vogelman (concurring):

Section 2(d) authorizes the Respondent to refrain from granting a visa to a person if "if he, or the organization or body on behalf of which he *acts*, knowingly published a public call for imposing a boycott on the State of Israel, as defined in the Prevention of Harm to the State of Israel by means of Boycott Law, 5711-2011, or has undertaken to participate in a boycott as aforesaid."

The relevant part of the section in the matter before the Court is knowingly publishing a public call for imposing a boycott on the State of Israel, and the relevant fact is that such a call was published by SJP, of which the Petitioner was a member, and not by the Petitioner herself. The

point of contention in the District Court and before us is the word “acts”, and it alone. The Petitioner argues that this shows that the authority under sec. 2(d) arises only in regard to a person who *at the time of requesting the visa* acts on behalf of a body or organization calling for a boycott. The Respondent is of the view that the language can be understood in a broader sense, and that it is sufficient that there be a significant fear that a person is likely to exploit his presence in Israel to promote a boycott.

The Petitioner’s view is more consistent with the language of the section. Moreover, the term “acts” also testifies to the nature of the involvement of a person requesting a visa in the organization that supports a boycott. The section does not refer to a “member” of the organization, which might arguably reflect a conceptual or ideological relationship, but rather “on behalf of which he acts”, which refers to taking active steps that serve the organization or its purposes.

Moreover, the protocols of the debates on the bill in committee show that the legislative intent was to prevent the entry of “authentic representatives” of boycott organizations who represent their ideas. That is also reflected by the change in the language of the bill from “representative” to “on behalf of which he acts”.

JUSTICES

Hendel, Neal	Primary Author	majority opinion
Baron, Anat	Author	concurrence
Vogelman, Uzi	Author	concurrence